Supreme Court, U.S.
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No. 03-

In the Supreme Court of the United States

BENJAMIN EGWAOJE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court can allow a criminal defendant to waive his Sixth Amendment right to counsel at trial, and therefore to exercise his correlative Sixth Amendment right to self-representation, without first conducting a detailed inquiry to ensure that the waiver was knowing and intelligent.

2. Whether this Court's decision in *Faretta v. California*, 422 U.S. 806 (1975), which established the Sixth Amendment right to self-representation at trial, should be overruled.

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INTRODUCTION

This case presents a question of fundamental importance to our criminal justice system: what courts must do before allowing criminal defendants to waive that most cherished of rights, the Sixth Amendment right to assistance of counsel. In this case, the Seventh Circuit upheld the district court's decision to allow petitioner to waive his right to counsel, despite the fact that the trial court provided only the barest of warnings about the consequences of doing so. In so concluding, the Seventh Circuit explicitly rejected the approach of other courts of appeals, which have required trial judges to conduct a detailed inquiry before allowing such a waiver. The Court's intervention is necessary to resolve this clear split in the circuits.

This case also presents the Court with an opportunity to reconsider its decision in *Faretta v. California*, 422 U.S. 806 (1975), which established a correlative Sixth Amendment right to self-representation at trial. Four Terms ago, in *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000), the Court cast substantial doubt on the reasoning of *Faretta*. The Court's decision in *Faretta* is inconsistent with a line of decisions holding that the assistance of counsel is necessary to ensure that a criminal defendant receives a fair trial. Where, as here, a criminal defendant is incapable of conducting his own defense in a credible manner, due process requires that a trial court have the discretion to insist that the defendant proceed with the assistance of counsel.

Finally, the Court may wish to hold this petition pending its decision in *Iowa v. Tovar*, No. 02-1541 (cert. granted Sept. 30, 2003). That case presents the question whether a trial court must warn a defendant about the usefulness of counsel at the guilty-plea stage. It seems unlikely that the Court's decision in *Tovar* will address the standard for waiver of the right to counsel at trial. Because *Tovar* has not yet been briefed on the merits, however, a hold for *Tovar* may be appropriate.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 335 F.3d 579 and reprinted in the appendix ("App.") at 2a-17a. The district court's unreported judgment is reprinted at App. 18a-23a.

JURISDICTION

The Seventh Circuit entered judgment on July 9, 2003. On September 10, 2003, Justice Stevens extended the time for filing this petition until November 6, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment of the United States Constitution states as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 28 U.S.C. § 1654 states as follows:

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

STATEMENT

1. On July 17, 2001, petitioner Benjamin Egwaoje was arrested at a Chicago-area bank after he attempted to withdraw funds under an assumed name. *See* App. 3a. He was duly charged with two counts of actual and attempted credit-card

fraud under 18 U.S.C. § 1029. *See id.* at 4a. Mr. Egwaoje initially retained counsel, but that attorney subsequently withdrew on the grounds that Mr. Egwaoje had refused to meet with him and that there had been "substantial conflicts" between them. *See id.* A second attorney was then appointed for Mr. Egwaoje, but that attorney, too, subsequently withdrew, claiming that Mr. Egwaoje was refusing to meet and cooperate with him. *See id.* at 6a.

In February 2002, the district court appointed a third attorney, Richard Halprin, to represent Mr. Egwaoje. *See id.* The court set the trial date for April 2, 2002. *See id.* It appears that Mr. Egwaoje was not present when the trial date was set.

2. On the morning of trial, a dispute arose between Mr. Egwaoje and Mr. Halprin. *See* C.A. App. 17. Mr. Egwaoje asked to proceed *pro se* and asked for a 60-day continuance in order to prepare for trial. *See* App. 6a-7a. The district court denied Mr. Egwaoje's request for a continuance, accusing Mr. Egwaoje of "play[ing] games" by simultaneously demanding a speedy trial and seeking a continuance. C.A. App. 16. As to Mr. Egwaoje's request to waive his right to counsel and proceed *pro se*, the district court then commented as follows:

> THE COURT: I am ordering you to be quiet until I finish and then you may speak.
>
> Your choice today is, you may proceed as your own lawyer, in which case what I will do is, I will ask Mr. Halprin to remain here to give you advice in case you have questions as to legal procedures, because you may need assistance in that — or, you can have Mr. Halprin as your lawyer. Those are your two choices.
>
> If you wish to proceed pro se, you are entitled to do so. The United States Constitution guaranties [*sic*] your right to proceed as your own lawyer. If you wish to proceed as your own lawyer, I am required to admonish you. Even if I weren't required, I would admonish you

that to represent yourself in any criminal case is a foolish act. You will almost certainly make significant tactical errors. You will almost certainly put yourself in a position where even if you had a lawful defense, you would be unable to present in a coherent way. On top of it, you will not, I think, adequately preserve the record in this case if error has been made.

So I strongly advise you against representing yourself. But I do tell you that that is your decision. You may choose to represent yourself, or you may choose to have Mr. Halprin represent you. The choice is yours. Now you can speak.

C.A. App. 16-17. The following colloquy immediately ensued:

MR. EGWAOJE: If I may say something, this is the first time I am in open court. This is the first time I'm going to ask for a continuance. I need 30 days at least to prepare my defense. This lawyer is not representing me, and I don't want him to be my lawyer, we just had an outburst right there in the cage. I am telling you I need 30 days. This is the first time I am asking you for a continuance. To let my family know that I am going to trial —

THE COURT: I understand that you have a motion for a continuance, the motion for a continuance is denied.

MR. EGWAOJE: This is the first time. He don't have to be here because he is not representing me. He is no longer my lawyer, the record shows that.

THE COURT: You are choosing to represent yourself?

MR. EGWAOJE: The government and you as the Judge, with all due respect, is playing games —

THE COURT: Answer my question. Are you

choosing to represent yourself?

MR. EGWAOJE: I didn't start —

THE COURT: Despite the warnings that I have given you?

MR. EGWAOJE: I want to proceed, I am asking you for a continuance. You are denying me bond, which is unconstitutional. Now you are telling me you are not going to give me a week to prepare my defense so I can start —

THE COURT: That is exactly what I am telling you — that is exactly what I am telling you.

Now having denied your motion for a continuance, do you wish to represent yourself, which I will tell you again is a foolish thing to do, but it is your right to do it.

MR. EGWAOJE: He is not my lawyer, I don't know why he is standing her [*sic*].

THE COURT: You have to answer my question.

MR. EGWAOJE: Judge, you have not appointed me a lawyer —

THE COURT: Do you wish to represent yourself today. Do you wish to represent yourself in this trial which is going to begin today.

MR. EGWAOJE: I will pro se. I don't know why he is standing here.

THE COURT: By pro se, you do wish to represent yourself?

MR. EGWAOJE: Yes, I don't have a lawyer. Where is my lawyer at?

THE COURT: Thank you, that is all I need to know.

Id. at 17-19.[1] The court subsequently granted Mr. Egwaoje a two-hour break to prepare for trial, and counsel handed over the case file to Mr. Egwaoje. *See id.* at 32.

At trial, Mr. Egwaoje presented no witnesses or evidence in his defense, and offered no evidentiary objections. He was repeatedly warned for asking irrelevant questions and making argumentative statements during cross-examination of the government's witnesses. *See, e.g.*, D. Ct. Trial Tr. 47-48, 67-74, 75-76, 88-92, 101-04, 114-16, 125-27, 145-46, 149, 152-53, 167-74, 175-76. The district court cut short Mr. Egwaoje's opening statement, ordering him to "sit down," and repeatedly terminated Mr. Egwaoje's cross-examinations, similarly ordering him to "sit down" or "stop." *Id.* at 43, 116, 127, 153, 174. And the district judge twice held Mr. Egwaoje in contempt for interrupting him. *See id.* at 10, 137. Perhaps unsurprisingly, the jury found Mr. Egwaoje guilty on both counts. *See* App. 18a. The district court subsequently sentenced him to 27 months in prison on each count, to be served concurrently, and ordered restitution and supervised release. *See id.* at 19a-23a.

3. The Seventh Circuit affirmed. *See id.* at 2a-17a. The court began by recognizing that, in the wake of this Court's decision in *Faretta*, the inquiry as to whether the right to self-representation is properly invoked is merely the "converse[]" of the inquiry as to whether the right to counsel is properly waived. *See id.* at 9a. As to the latter, the court, citing one of its earlier decisions, stated that the inquiry turned on (1) whether the district court conducted a formal hearing into the defendant's decision to represent himself; (2) whether other evidence in the record established that defendant understood the disadvantages of self-representation; (3) the background and

---

[1] At a prior hearing, Mr. Egwaoje had indicated that he did not want to proceed *pro se* at trial, but instead wanted a new appointed lawyer. *See* D. Ct. Tr. 4 (Feb. 6, 2002).

experience of the defendant; (4) the context of the defendant's decision to proceed *pro se*. *See id.* at 9a-10a. The court reasoned that "[t]his is not a formalistic, mechanical, approach," and added that, "[r]egardless of the consideration of these individual factors, our inquiry at all times is directed to the record as a whole and we ask whether that record supports a knowing and intelligent waiver." *Id.* at 10a.

The Seventh Circuit then rejected Mr. Egwaoje's contention that, as a matter of law, the district court should have conducted a more thorough inquiry before allowing him to waive his right to counsel. *See id.* at 10a-11a. Specifically, the court refused to require district courts to use the model inquiry laid out in the federal benchbook. *See id.* at 10a. The court noted that "[o]ther courts of appeal[s] have adopted this *Miranda*-style prophylactic approach," *id.* (citing *United States v. McDowell*, 814 F.2d 245 (6th Cir. 1987)), but observed that the Seventh Circuit had not, and "reaffirm[ed] that position here," *id.* Again citing its earlier decisions, the court noted that, while it would be "prudent" for a trial court to conduct a more thorough inquiry, it was not required. *See id.*

Applying its lower standard for the waiver inquiry, the Seventh Circuit concluded that Mr. Egwaoje had knowingly and intelligently waived his right to counsel. *See id.* at 11a-13a. The court first noted that there was "no question that the [trial] court satisfied its obligation to warn Egwaoje of the dangers of self-representation." *Id.* at 11a. It added that Mr. Egwaoje was competent to stand trial and had attended two years of college. *See id.* The court noted that, although Mr. Egwaoje had never been to trial and had never before been charged federally, he was "no stranger" to the criminal justice system. *Id.* And the court contended that there was evidence suggesting that Mr. Egwaoje was "deliberately manipulating the system" in an attempt to create an appealable issue. *Id.* at 12a.

Finally, the Seventh Circuit rejected Mr. Egwaoje's argument that the district court should have refused to allow him to

represent himself on the ground that he lacked the ability to conduct his trial effectively. *See id.* at 13a. It cited this Court's precedents in concluding that such an argument was foreclosed. *See id.* The court also rejected Mr. Egwaoje's contentions that he did not receive a fair trial, that the district court erred by denying his request for a continuance, and that the district court failed adequately to explain the sentence it imposed. *See id.* This petition follows.

REASONS FOR GRANTING THE PETITION

A. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS REGARDING THE REQUISITE INQUIRY BEFORE A DEFENDANT CAN WAIVE HIS RIGHT TO COUNSEL AT TRIAL.

By refusing to require a trial court to conduct a detailed inquiry before allowing a defendant to waive his Sixth Amendment right to the assistance of counsel, the Seventh Circuit stands in conflict with other courts of appeals. Certiorari is warranted to resolve this split in the circuits. *See* S. Ct. R. 10(a).

1. Although this Court has long recognized that the right to counsel may be waived if the waiver is knowing and intelligent, *see, e.g.*, *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938), and that a trial court should indulge in every reasonable presumption against a waiver of that right, *see, e.g.*, *Brewer v. Williams*, 430 U.S. 387, 404 (1977), the Court has never definitively specified the inquiry that a trial court should conduct before allowing a defendant to waive the right to counsel. In *Von Moltke v. Gillies*, 332 U.S. 708 (1948), a four-Justice plurality concluded that, in the context of a guilty-plea proceeding, a trial judge should "make a thorough inquiry and * * * take all steps necessary to insure the fullest protection of [the] constitutional right [to counsel] at every stage of the proceedings." *Id.* at 722 (plurality opinion). Writing for the plurality, Justice Black

listed a number of considerations of which the trial judge should inform the defendant before accepting a waiver:

> The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

Id. at 724.

Since the Court's decision in *Von Moltke*, the Court has recognized a correlative Sixth Amendment right to self-representation. *See Faretta*, 422 U.S. at 807. As a result, the inquiry whether a defendant has knowingly and intelligently waived his right to counsel is now coterminous with the inquiry whether a defendant is validly entitled to represent himself at trial. And in *Faretta* itself, the Court noted that a defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Id.* at 835 (internal quotation omitted); *see also United States v. Vonn*, 535 U.S. 55, 73 n.10 (2002) (citing *Faretta* for proposition that a defendant can choose self-representation only "after a warning from the court of the perils [it] entails"); *Patterson v. Illinois*, 487 U.S. 285, 298 (1988) (citing *Faretta* for proposition that "we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial"). Commentators have noted that language from *Faretta* "[a]rguably" suggests that a detailed inquiry is a "constitutional necessity" before a defendant can waive his right to counsel and

proceed *pro se*. 3 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* § 11.5(c), at 577 (2d ed. 1999).

2. In the absence of more specific guidance from this Court, the courts of appeals have irreconcilably split on whether a trial court must conduct a detailed inquiry before allowing a defendant to waive the right to counsel.

a. As the court below noted, several courts of appeals have "adopted [a] *Miranda*-style prophylactic approach" and required such a detailed inquiry. App. 10a. Most notably, in *McDowell*, the Sixth Circuit, invoking its supervisory powers, required district judges in the circuit to use the model inquiry laid out in the federal benchbook, or its material equivalent, before allowing a defendant to represent himself. *See* 814 F.2d at 249-50. The court acknowledged that, in the wake of this Court's decision in *Faretta*, district courts were left "in a much more difficult position," since "an overprotective judge who refuses to allow a defendant to jeopardize his own defense" and "a judge who does not make a copious inquiry into the thought process of the accused" could both be reversed. *Id.* at 248-49. Although the court noted that a majority of the other circuits then on record had refused to require a "deliberate and searching inquiry" before waiver could be found, *id.* at 249, and ultimately held that the defendant in the case had in fact knowingly and intelligently waived his right to counsel notwithstanding the absence of such an inquiry, *see id.*, it nevertheless prospectively ordered district courts in the circuit to use the model inquiry from the federal benchbook, or an inquiry "covering the same substantive points." *Id.* at 250. In its present form, the model inquiry proceeds as follows:

> 1. Have you ever studied law?
>
> 2 Have you ever represented yourself in a criminal action?
>
> 3. Do you understand that you are charged with these crimes: [*state the crimes with which the defendant*

is charged]?

4. Do you understand that if you are found guilty of the crime charged in Count I the court must impose an assessment of $50 and could sentence you to as many as ___ years in prison and fine you as much as $___? [*Ask defendant a similar question for each crime with which he or she may be charged in the indictment or information.*]

5. Do you understand that if you are found guilty of more than one of these crimes this court can order that the sentences be served consecutively, that is, one after another?

6. Do you understand that the U.S. Sentencing Commission has issued sentencing guidelines that will affect your sentence if you are found guilty?

7. Do you understand that if you represent yourself you are on your own? I cannot tell you or even advise you how you should try your case.

8. Are you familiar with the Federal Rules of Evidence?

9. Do you understand that the Federal Rules of Evidence govern what evidence may or may not be introduced at trial and that, in representing yourself, you must abide by those rules?

10. Are you familiar with the Federal Rules of Criminal Procedure?

11. Do you understand that those rules govern the way a criminal action is tried in federal court?

[*Then say to defendant something to this effect:*]

12. I must advise you that in my opinion a trained lawyer would defend you far better than you could defend yourself. I think it is unwise of you to try to

represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I strongly urge you not to try to represent yourself.

13. Now, in light of the penalty that you might suffer if you are found guilty, and in light of all of the difficulties of representing yourself, do you still desire to represent yourself and to give up your right to be represented by a lawyer?

14. Is your decision entirely voluntary?

1 Federal Judicial Center, *Benchbook for U.S. District Court Judges*, § 1.02, at 4-5 (4th ed. 1996). Since *McDowell* was decided, the Sixth Circuit has repeatedly reaffirmed its requirement that district judges use the model inquiry, or one like it, before a waiver can be found. *See, e.g., United States v. Modena*, 302 F.3d 626, 630 (6th Cir. 2002), *cert. denied*, 537 U.S. 1145 (2003); *United States v. Herrera-Martinez*, 985 F.2d 298, 301 (6th Cir. 1993); *United States v. Miller*, 910 F.2d 1321, 1324 (6th Cir. 1990).

b. Several courts of appeals, while not specifically mandating the use of the model inquiry, have similarly required that district judges conduct some form of inquiry before allowing waiver of the right to counsel. The Third Circuit has stated that a district judge should engage in a "searching inquiry" before finding waiver. *See United States v. Welty*, 674 F.2d 185, 189 (3d Cir. 1982).[2] Although the Third Circuit did not require a "detailed listing of advice," *id.*, it noted that the

[2] Notably, the Third Circuit required a detailed inquiry even when the trial judge suspects that the defendant is "attempting to disrupt the administration of justice by manipulative requests for, and dismissals of, counsel." *United States v. Welty*, 674 F.2d 185, 193 (3d Cir. 1982). The Court reasoned that "even well founded suspicions of intentional delay and manipulative tactics can provide no substitute for the inquiries necessary to protect a defendant's constitutional rights." *Id.* at 189.

district judge should "advise [the defendant] in unequivocal terms both of the technical problems he may encounter in acting as his own attorney and of the risks he takes if his defense efforts are unsuccessful," *id.* at 188. Thus, the district court "should tell the defendant, for example, that he will have to conduct his defense in accordance with the Federal Rules of Evidence and Criminal Procedure, rules with which he may not be familiar; that the defendant may be hampered in presenting his best defense by his lack of knowledge of the law; and that the effectiveness of his defense may well be diminished by his dual role as attorney and accused," and should also inform the defendant of the considerations listed in this Court's plurality opinion in *Van Moltke*. *Id.* at 188-89. The Third Circuit has since stated that the rule of *Welty* was constitutionally mandated, *see United States v. Peppers*, 302 F.3d 120, 135 (3d Cir.), *cert. denied*, 537 U.S. 1062 (2002), and that the model inquiry from the federal benchbook provided a "useful framework" for district courts to follow, *id.* at 136-37.

Similarly, the D.C. Circuit, like the Sixth Circuit, has exercised its supervisory powers to require that district judges "mak[e] clear on the record the awareness by defendants of the dangers and disadvantages of self-representation as to which the Supreme Court in *Faretta* has voiced its concern." *United States v. Bailey*, 675 F.2d 1292, 1300 (D.C. Cir. 1982); *but see United States v. Klat*, 156 F.3d 1258, 1265 n.8 (D.C. Cir. 1998) (suggesting that "sustained colloquy" was not required because record "otherwise establishe[d]" knowing and intelligent waiver). The Tenth Circuit, while refusing to require a "precise litany," has stated that district judges "should conduct an inquiry sufficient to establish a defendant's knowledge and understanding of the factors articulated" in *Von Moltke*, and that the absence of such an inquiry "mandates" reversal of a finding of waiver. *United States v. Padilla*, 819 F.2d 952, 959 (10th Cir. 1987); *see also United States v. Allen*, 895 F.2d 1577, 1578-79 (10th Cir. 1990) (same); *but see United States v.*

Willie, 941 F.2d 1384, 1389 (10th Cir. 1991) (upholding waiver where "surrounding facts and circumstances * * * demonstrate that [defendant] actually understood his right to counsel and the difficulties of *pro se* representation and knowingly and intelligently waived his right to counsel").[3]

c. Like the Seventh Circuit, other courts of appeals have held that district courts are not required to engage in *any* inquiry before a defendant can be found to waived the right to counsel. *See, e.g., United States v. Hafen*, 726 F.2d 21, 25-26 (1st Cir. 1984) (rejecting argument that a "district court must issue a particular warning or make specific findings of fact before it allows the defendant to proceed *pro se*"); *United States v. Tompkins*, 623 F.2d 824, 828-29 (2d Cir. 1980) (noting that colloquy between judge and defendant is "generally required," but adding that requirement is "not absolute"); *United States v. Gallop*, 838 F.2d 105, 110 (4th Cir. 1988) (stating that failure to engage in colloquy does not "automatically render the proceedings unconstitutional"); *Wiggins v. Procunier*, 753 F.2d 1318, 1320 (5th Cir. 1985) (refusing to apply "bright-line" requirement of colloquy); *United States v. Stewart*, 20 F.3d 911, 917 (8th Cir. 1994) (finding valid waiver "if a district court adequately warns a defendant or if, on the record as a whole, we determine that the defendant knew and understood the disadvantages of self-representation"); *United States v. Keen*, 104 F.3d 1111, 1114-15 (9th Cir. 1996) (describing inquiry as "preferred procedure"); *Strozier v. Newsome*, 926 F.2d 1100, 1108 (11th Cir. 1991) (noting that hearing is "preferred," but that "in rare cases" record might support waiver even in absence

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[3] Similarly, some highest state courts, often acting in accordance with court rules, have required a detailed inquiry. *See, e.g., State v. Young*, 626 So. 2d 655, 657 (Fla. 1993) (holding that reversal is required in absence of "proper *Faretta* inquiry"); *People v. Adkins*, 551 N.W.2d 108, 118 (Mich. 1996) (refusing to require trial court to engage in "word-for-word litany approach," but requiring "substantial compliance" with inquiry requirement); *Commonwealth v. Brazil*, 701 A.2d 216, 219 (Pa. 1997) (requiring that trial courts engage in "full and complete waiver colloquy" on record).

of hearing) (internal quotation omitted).[4]

3. Commentators have recognized that the lower courts are divided on the extent to which an inquiry must be conducted before a defendant can waive the right to counsel. *See, e.g.*, 3 LaFave, Israel & King, *supra*, § 11.5(c), at 576-80. In fact, two members of this Court, in dissenting from the denial of certiorari in the Sixth Circuit's *McDowell* case, urged that the Court intervene to resolve the circuit split on this issue. *See McDowell v. United States*, 484 U.S. 980 (1987) (White, J., dissenting). Writing for himself and Justice Brennan, Justice White observed that, "[s]ince *Faretta*, lower federal and state courts have sought to arrive at the proper balance between allowing an accused to exercise his right of self-representation, and at the same time, insuring that a waiver of a defendant's right to counsel is only made when 'knowing and intelligent' and 'with eyes open.'" *Id.* He then noted that the approach of the Sixth, Third, and D.C. Circuits conflicted with that of the First, Second, Seventh, and Ninth Circuits, which had taken the position that "no specific inquiries or special hearings must be conducted" before a defendant could waive the right to counsel. *Id.* That conflict, he continued, "ha[d] * * * gained the attention of, and been a source of confusion to, the state courts as well." *Id.* Since Justice White's dissent from the denial of certiorari, all of the remaining federal courts of appeals have spoken on the issue, and some of the courts of appeals that had already spoken have refined their position. To the extent it was not in 1987, therefore, the issue is therefore now ripe for this

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[4] Other highest state courts have also held that an inquiry is not always necessary. *See, e.g., State v. Wilson*, 564 N.W.2d 241, 251 (Neb. 1997) (noting that warnings are "not required" and that "[a] knowing and intelligent waiver can be inferred from conduct") (internal quotation omitted); *Hickey v. State*, 846 P.2d 289, 292 (Nev. 1993) (concluding, following Ninth Circuit, that "omission of a *Faretta* canvass is not reversible error"); *State v. Crisafi*, 608 A.2d 317, 325 (N.J. 1992) (noting, citing Eleventh Circuit, that "the absence of a searching inquiry will not undermine the waiver of counsel" in "rare cases").

Court's consideration.

4. This case provides a perfect vehicle to address whether a trial court must conduct a detailed inquiry before allowing a defendant to waive the right to counsel. It is indisputable that, if the Seventh Circuit had followed the Sixth Circuit's approach and measured the district judge's brief warning against the model inquiry in the federal benchbook, it would have invalidated, rather than upheld, Mr. Egwaoje's waiver of the right to counsel. Indeed, only *one* of the fourteen requirements of the benchbook inquiry — the requirement that the defendant be warned about the dangers of proceeding with self-representation — was even arguably satisfied here. *See* C.A. App. 16-17. In the brief colloquy preceding Mr. Egwaoje's waiver, the district judge did not recite the charges against Mr. Egwaoje; did not inform Mr. Egwaoje of the sentence he faced if he was found guilty; and did not advise Mr. Egwaoje about the governing rules at trial. Nor can the judge's failure to engage in a more detailed inquiry be treated as harmless. *Cf. Chapman v. California*, 386 U.S. 18, 23 & n.8 (1967) (noting that right to assistance of counsel is among those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error"). This Court should grant certiorari, and hold that the minimal warning that Mr. Egwaoje received was inadequate to enable him knowingly and intelligently to waive his right to counsel.

B. THIS COURT SHOULD RECONSIDER ITS DECISION IN *FARETTA v. CALIFORNIA*.

Even if this Court were to conclude that Mr. Egwaoje knowingly and intelligently waived his right to counsel, this case also presents an ideal opportunity for the Court to revisit its underlying decision in *Faretta*, which established the Sixth Amendment right to self-representation at trial. Because the Seventh Circuit stated that the inquiry as to whether the right to self-representation is properly invoked is merely the "converse[]" of the inquiry as to whether the right to counsel is

properly waived, *see* App. 9a, and because the Seventh Circuit rejected Mr. Egwaoje's argument that the district court should have refused to allow him to represent himself on the ground that he lacked the ability to conduct his trial effectively, *see id.* at 13a, the question whether a criminal defendant has the automatic right to represent himself after validly waiving his right to counsel is squarely presented here. Having cast substantial doubt on the rationale of *Faretta* in its recent decision in *Martinez*, the Court should take this opportunity to reconsider *Faretta* more directly, and hold that a trial court has discretion, in appropriate circumstances, to insist that a defendant proceed with the assistance of counsel.

1. In *Faretta*, the Court (per Stewart, J., joined by Douglas, Brennan, White, Marshall, and Powell, JJ.) began by observing that the right of self-representation had been protected by statute since the early days of the Republic. *See* 422 U.S. at 812-13 (citing 28 U.S.C. § 1654). The Court noted that the constitutions of 36 States expressly conferred the right, *see id.*, and that the Court (albeit in dictum) and lower federal and state courts had previously indicated that such a right existed as a matter of federal constitutional law, *see id.* at 813-16.

The Court proffered three principal justifications for its conclusion that Sixth Amendment guaranteed a right to self-representation. *First*, the Court asserted that the "structure of the Sixth Amendment" supported such a right. *Id.* at 818. It reasoned that "[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." *Id.* at 819. While acknowledging that the right to self-representation was "not stated in the Amendment in so many words," the Court contended that such a right was "necessarily implied" by the Sixth Amendment's structure. *Id.* It added that the counsel provision of the Sixth Amendment spoke only of "assistance" of counsel, and that "[t]he language and the spirit of the Sixth Amendment contemplate that counsel, like the other defense

tools guaranteed by the Amendment, shall be an aid to a *willing* defendant." *Id.* at 820 (emphasis added).

Second, the Court asserted that the "implie[d]" right of self-representation in the Sixth Amendment was reinforced by the amendment's roots in English legal history. *See id.* at 821. It noted that the Star Chamber was the only English tribunal in which unwilling criminal defendants were forced to have counsel, and that a defendant before the Star Chamber was considered to have confessed unless counsel agreed to sign an answer to the indictment. *See id.* at 821-22. After the Star Chamber was abolished, defendants were *required* to represent themselves in all cases, and later in all felony prosecutions. *See id.* at 823. In fact, the Court noted, the ban on counsel in felony cases was not entirely eliminated until 1836, and Parliament did not provide for the court appointment of counsel until even later. *See id.* at 825.

Third, the Court contended that insistence on the right to self-representation was even "more fervent" in the American colonies than it had been in England. *Id.* at 826. According to the Court, "[t]he colonists brought with them an appreciation of the virtues of self-reliance and a traditional distrust of lawyers." *Id.* Although the Court conceded that colonial courts, unlike English courts, allowed felons the aid of the counsel, it noted that "the basic right of self-representation was never questioned." *Id.* at 827-28. The Court added that "[t]he right of self-representation was guaranteed in many colonial charters and declarations of rights," *id.* at 828, and, upon the formation of the Nation, "entered the new state constitutions in wholesale fashion," *id.* at 829. The Court again recognized that the Judiciary Act of 1789 gave defendants the right to "'plead and manage their own causes personally or by the assistance of * * * counsel,'" *id.* at 831 (quoting 28 U.S.C. § 1654), and noted that, "[i]f anyone had thought that the Sixth Amendment, as drafted, failed to protect the long-respected right of self-representation, there would undoubtedly have been some debate

or comment on the issue," *id.* at 832. The Court therefore concluded that "[t]he Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation." *Id.*

The Court conceded that "[t]here can be no blinking the fact that the right of an accused to conduct his own defense seems to conduct against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel." *Id.* (citing, *inter alia*, *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932)). It noted that "the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial." *Id.* at 832-33. And it recognized that "a strong argument can surely be made that the whole thrust of those decisions must inevitably lead to the conclusion that a State may constitutionally impose a lawyer upon even an unwilling defendant." *Id.* at 833. The Court summarily rejected that argument, however, reasoning that it was "one thing" to hold that a defendant had the right to the assistance of counsel and "quite another" to compel a defendant to accept a lawyer he did not want. *Id.*

The Court also conceded that "in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." *Id.* at 834. But it noted that "[t]he defendant, and not his lawyer or the State, will bear the personal consequences of a conviction," and that "[i]t is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage." *Id.*

Chief Justice Burger, joined by Justice Blackmun and then-Justice Rehnquist, dissented. He criticized the Court for indulging "the judicial tendency to constitutionalize what is thought 'good,'" and added that "there is nothing desirable and useful in permitting every accused person, even the most uneducated and inexperienced, to insist upon conducting his

own defense to criminal charges." *Faretta*, 422 U.S. at 836 (Burger, C.J., dissenting). He rejected the Court's argument that the right to self-representation is "tucked between the lines of the Sixth Amendment," noting that "the conclusion that the right[s] guaranteed by the Sixth Amendment are 'personal' to an accused reflects nothing more than the obvious fact that it is he who is on trial and therefore has need of a defense." *Id.* at 837. "[I]n all but an extraordinarily small number of cases," Chief Justice Burger continued, "an accused will lose whatever defense he may have if he undertakes to conduct the trial himself." *Id.* at 838. He rejected the argument that "the quality of his representation at trial is a matter with which only the accused is legitimately concerned," reasoning that the prosecution, the judge, and the public at large all had an interest in ensuring that justice is achieved in every criminal trial. *Id.* at 839. As to precedent, Chief Justice Burger reasoned that the majority's rule had not been even "hinted at" in the Court's previous decisions, and in fact represented a "perversion" of decisions such as *Argersinger* and *Gideon*. *Id.* at 843. And he contended that the provision of a *statutory* right to self-representation in the Judiciary Act of 1789 weighed against, not in favor of, the finding of a *constitutional* right to self-representation in the contemporaneously drafted Sixth Amendment. *See id.* at 844.

Justice Blackmun, joined by Chief Justice Burger and Justice Rehnquist, also dissented. He stated that it was "self-evident" that the Sixth Amendment made no direct reference to self-representation, and noted that the Court had previously rejected the argument that the ability to waive a constitutional right (here, the right to assistance of counsel) necessarily implied the right to insist upon the opposite of that right (here, the right to self-representation). *See Faretta*, 422 U.S. at 847 (Blackmun, J., dissenting) (citing *Singer v. United States*, 380 U.S. 24 (1965)). He reasoned that, while the guarantees of the Sixth Amendment were "personal to the accused," the Sixth

Amendment did not guarantee "any particular procedural method of asserting those rights." *Id.* at 848. According to Justice Blackmun, therefore, nothing in the Constitution "requires the States to subordinate the solemn business of conducting a criminal prosecution to the whimsical — albeit voluntary — caprice of every accused who wishes to use his trial as a vehicle for personal or political self-gratification." *Id.* at 849. As for the Court's historical evidence, Justice Blackmun reasoned that it was "equally plausible" that the silence of the Sixth Amendment as to the right of self-representation indicated that the Framers were simply not thinking about self-representation when they drafted it. *See id.* at 850. He added that the Court's subsequent cases elaborating the right to counsel were, as the Court recognized, "based on the premise that representation by counsel is essential to ensure a fair trial." *Id.* at 851. He concluded that the Court's decision would lead to a "drastic curtailment of the interest of the State in seeing that justice is done in a real and objective sense." *Id.*

2. In *Martinez*, the Court took up the question whether a defendant had the constitutional right to self-representation on appeal. Although the Court could readily have distinguished *Faretta* on the ground that the Sixth Amendment does not attach on appeal, *see Martinez*, 528 U.S. at 160, the Court (per Stevens, J., joined by the entire Court except Scalia, J.) went out of its way to address, and criticize, each of the articulated justifications for the rule in *Faretta*. As to *Faretta*'s historical evidence, the Court discounted that evidence on the ground that "it pertained to times when lawyers were scarce, often mistrusted, and not readily available to the average person accused of crime." *Id.* at 156. For that reason, "a government's recognition of an indigent defendant's right to represent himself was comparable to bestowing upon the homeless beggar a 'right' to take shelter in the sewers of Paris." *Id.* at 157. And the Court noted that, in light of its decision in *Gideon v. Wainwright*, "an individual's decision to represent himself is no

longer compelled by the necessity of choosing self-representation over incompetent or nonexistent representation." *Id.* at 158. As a result, "the original reasons for protecting [the] right do not have the same force when the availability of competent counsel for every indigent defendant has displaced the need — although not always the desire — for self-representation." *Id.* As to *Faretta*'s analysis of the Sixth Amendment itself, the Court summarily characterized that analysis as "nontextual." *See id.* at 160.

The Court further noted that "[n]o one, including Martinez and the *Faretta* majority, attempts to argue that as a rule *pro se* representation is wise, desirable, or efficient." *Id.* at 161. In fact, the Court acknowledged that some critics had argued that allowing a defendant to proceed *pro se* was akin to allowing him to waive his right to a fair trial. *See id.* at 161 n.9. And the Court added that, although the *Faretta* Court described the right to self-representation as "fundamental," representation by counsel was the standard, rather than the exception. *See id.* at 161. The Court noted that the right to self-representation was "not absolute," and added, without elaboration, that "[e]ven at the trial level, * * * the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Id.* at 161-62.

Justice Kennedy concurred. He noted that it was "unnecessary" to cast doubt upon *Faretta*'s rationale in order to decide the case. *See* 528 U.S. at 164 (Kennedy, J., concurring). He concluded that, even accepting the validity of *Faretta*, "it does not follow that a convicted person has a similar right of self-representation on appeal," since "[d]ifferent considerations apply in the appellate system." *Id.*

Justice Breyer also concurred. He observed that "judges closer to the firing line have sometimes expressed dismay about the practical consequences of [*Faretta*'s] holding," but noted the absence of empirical evidence that *Faretta*'s holding has proven "counterproductive in practice." 528 U.S. at 164-65

(Breyer, J., concurring). For that reason, he concluded that the Court was "not in a position to reconsider the constitutional assumptions that underlie that case." *Id.* at 165.

Finally, Justice Scalia concurred only in the judgment. He indicated that he "d[id] not share the apparent skepticism" of the majority about *Faretta*, and, alone among the Justices writing in *Martinez*, expressed the view that, while he might have relied on the Due Process Clause rather than the Sixth Amendment, *Faretta* was correctly decided. 528 U.S. at 165 (Scalia, J., concurring in the judgment). He reasoned that the mere fact that asserting the right to self-representation may often, or even usually, work to the defendant's disadvantage was irrelevant. *See id.* But he concluded that the instant case could readily be decided on the ground that there is no constitutional right to appeal, and therefore that the State could require all appeals to be prosecuted through counsel. *See id.* at 165-66.

3. The Court should grant certiorari in this case to resolve the lingering uncertainty about the validity of *Faretta* in the wake of the Court's decision in *Martinez*. As the Court is aware, *see Martinez*, 528 U.S. at 161 n.10, *Faretta* has been the object of substantial criticism, *see, e.g.*, Martin Sabelli & Stacey Leyton, *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System*, 91 J. Crim. L. & Criminology 161 (2000); John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After Faretta*, 6 Seton Hall Const. L.J. 483 (1996).

Faretta has principally been attacked for elevating a defendant's interest in autonomy over the defendant's, and society's, interest in the fairness of criminal proceedings — in contravention of this Court's many other cases emphasizing that the assistance of counsel is necessary to ensure a fair trial. *See, e.g.*, Sabelli & Layton, *supra*, at 208-11; *see generally Wheat v.*

United States, 486 U.S. 153, 160 (1988) (discussing "institutional interest in the rendition of just verdicts in criminal cases"); *Estes v. Texas*, 381 U.S. 532, 540 (1965) (describing right to fair trial as "the most fundamental of all freedoms"). In the words of one critic, "[*Faretta*] completely ignores how self-representation in criminal trials will affect the public who views such cases — whether that public is the jury in the case or the wider public watching the case on TV — and thus risks undermining public confidence in the criminal justice system." Tracey L. Meares, *What's Wrong With Gideon*, 70 U. Chi. L. Rev. 215, 227 (2003) (footnote omitted). As recent high-profile cases involving *pro se* defendants amply demonstrate, the risk that self-representation will undermine confidence in the criminal justice system is a very real one.[5]

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[5] Since asserting his right to represent himself, Zacarias Moussaoui, the only person thus far charged with involvement in the 2001 terrorist attacks, has "insulted his standby lawyers, blasted the judge and taunted the Justice Department with a stream of blistering handwritten motions and courtroom outbursts." Jerry Markon, *Moussaoui Is Spinning a Legal Web*, Wash. Post, May 27, 2003, at A1. Partly for that reason, while "[t]he government and others boasted that Moussaoui would receive swift justice in an open courtroom as a showcase for the world about the fairness of the U.S. judicial system," "[n]ow those same people say privately that the system has been turned on its head." *Id.*

More recently, John Allen Muhammad asserted his right to represent himself, albeit temporarily, in his capital murder trial stemming from his alleged participation in the 2002 Washington sniper attacks. One pundit described his opening statement as "about as legally compelling as a Lewis Carroll poem." Dahlia Lithwick, *Court-Assisted Suicide: Why Only Serial Killers Have a Right to Die*, Slate, Oct. 21, 2003, *available at* http://slate.msn.com/id/2090132. The following excerpt from that statement is representative:

> Well, the whole truth. What is the whole truth? The whole truth, what I found out when I asked that is, Don't take anything away from the truth, which means when we take something away from it, it's not a whole anymore. If we do that, that's a lie. If we do that, we are deceiving. What's nothing but the truth? Well, that means you don't add nothing to the truth. If we do that, we deceiving.

This case would have been a particularly apt one in which to require the defendant to proceed with the assistance of counsel, because Mr. Egwaoje was evidently incapable of conducting a serious defense. Although Mr. Egwaoje may have been competent to stand trial (and therefore, under this Court's precedents, competent to waive his right to counsel, *see Godinez v. Moran*, 509 U.S. 389, 399, 402 (1993)), it was clear from the colloquy that he was unlikely to be able to mount a competent *defense*. And it is clear that Mr. Egwaoje's defense in fact proved to be egregiously deficient. Mr. Egwaoje presented no witnesses or evidence, offered no evidentiary objections, was repeatedly admonished for his conduct in cross-examination, and was twice even held in contempt. Where a trial court perceives that a criminal defendant is incapable of conducting his own defense in a credible manner, and therefore incapable of receiving a fair trial, the court should have the discretion to insist that the defendant proceed with the assistance of counsel.

Finally, to the extent that the Court does not wish to revisit its decision in *Faretta* directly, the dubious vitality of the right to self-representation suggests, at a minimum, that the Court should erect a high bar before allowing a defendant to waive the correlative right to counsel. If the Court chooses not to grant certiorari on the question whether *Faretta* should be overruled, therefore, the Court should at least grant certiorari on the threshold question and hold that trial courts should engage in a

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> We are telling a lie, so this is why it's important that we tell the whole truth and nothing but the truth. But how do we jump from the truth to the whole truth to nothing but the truth when at one time all we had was the truth? Jesus said, "You shall know the truth." He didn't say you shall know the whole truth and nothing but the truth. The truth. For what happened between that time and this time to where we got to deal with three truths?

John Allen Muhammad's Opening Statement, Oct. 20, 2003, *available at* http://www.cnn.com/2003/LAW/10/20/muhammad.statement/index.html.

detailed inquiry before allowing a defendant to embark on the risky course of proceeding *pro se*. Especially in light of the Court's decision in *Martinez*, however, petitioner respectfully submits that the Court should grant certiorari on both questions and take this opportunity to clarify whether *Faretta* remains good law.

C. THE COURT MAY WISH TO HOLD THIS PETITION FOR *IOWA v. TOVAR*.

Finally, the Court may wish to consider holding this petition pending its decision in *Iowa v. Tovar*. That case presents the question whether a trial court must specifically warn a defendant about the usefulness of counsel at the guilty-plea stage.

In *Patterson*, this Court suggested that the prerequisites for waiver of the right to counsel at the guilty-plea stage were discrete from the prerequisites for waiver of that right at trial:

> At one end of the spectrum, we have concluded there is no Sixth Amendment right to counsel whatsoever at a postindictment photographic display identification * * *. At the other extreme, recognizing the enormous importance and role that an attorney plays at a criminal trial, we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial. In these extreme cases, and in others that fall between these two poles, we have defined the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel. An accused's waiver of his right to counsel is "knowing" when he is made aware of these basic facts.

487 U.S. at 298 (citations omitted). Even the petitioner in *Tovar* has recognized that a "much more searching inquiry" is

required before the right to counsel can be waived at trial than at earlier stages of criminal proceedings. 02-1541 Pet. 12.

It seems likely, therefore, that the Court's decision in *Tovar* will not address the requirements for waiver of the right to counsel *at trial*, much less the ongoing validity of the right to *self-representation* at trial. Because none of the merits briefs have yet been filed in *Tovar*, however, the full scope of the issues raised in *Tovar* is not yet clear. Out of an abundance of caution, therefore, a hold for *Tovar* may be appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted, or at a minimum held pending this Court's disposition of *Iowa v. Tovar*, No. 02-1541.

Respectfully submitted,

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APPENDIX
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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 02-2868

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BENJAMIN EGWAOJE,

Defendant-Appellant.

July 9, 2003

Before **EASTERBROOK, KANNE,** and **DIANE P. WOOD,** Circuit Judges.

KANNE, Circuit Judge:

On the morning of his trial for credit-card fraud, defendant Benjamin Egwaoje informed the district court that he no longer required the services of his attorney — his third since he had been indicted and the second to be appointed by the court — and that he wished to proceed *pro se.* After warning him about the dangers of self-representation, the district court reluctantly granted his request but asked that his former attorney remain to assist him as standby counsel. The district court also denied Egwaoje's request for a continuance (which he had argued was necessary in order for him to prepare to act as his own advocate) and the trial commenced as scheduled. At the

conclusion of his two-day trial, a jury found him guilty on both counts of the indictment. The court sentenced him to a twenty-seven-month prison term, to be followed by a three-year term of supervised release, and ordered him to pay $38,985 in restitution.

Egwaoje appeals his conviction and sentence arguing (1) that he did not make a knowing and intelligent waiver of his right to counsel; (2) that the district court abused its discretion in not granting his request for a continuance; (3) that his *pro se* representation resulted in a trial so lacking in fundamental fairness that he was denied due process of law; and (4) that the district court erred in refusing to consider his motion for downward departure at sentencing based on his status as a deportable alien. We reject all his arguments and affirm both his conviction and sentence.

HISTORY

The Crime

Egwaoje spent the summer months of 2001 visiting several Chicago-area banks, withdrawing thousands of dollars in cash by using credit cards that he had obtained through fraudulent means. It was a lucrative venture for Egwaoje; he swindled the target banks out of nearly $39,000. But while Egwaoje's summer may have been profitable, it was not endless. On July 17, 2001, a repeat visit to one particular bank location alerted a bank employee, who recognized Egwaoje but remembered him previously using a different name to withdraw funds. Her suspicions raised, the teller stalled Egwaoje and called the police, who promptly arrived to arrest him. The officers found Egwaoje to possess the fraudulently obtained credit card that he had tried to use to withdraw funds as well as fake identification cards in the name of the cardholder.

Pretrial Proceedings

Egwaoje retained attorney Gary Sternberg to represent him at his July 23, 2001 preliminary hearing in front of a magistrate.

The magistrate judge found probable cause for his arrest, and a grand jury subsequently returned a two-count indictment against Egwaoje on August 15, 2001, charging credit-card fraud in violation of 18 U.S.C. § 1029(a)(2) (use of unauthorized credit cards to obtain cash advances from different banks in an amount in excess of $1000) & (b)(1) (attempting to obtain a cash advance with an unauthorized credit card).

Months later, on November 5, 2001, Sternberg moved to withdraw from representing Egwaoje because his client had refused to meet with him and because of "substantial conflicts" between them. The district court granted Sternberg's motion and appointed Leonard Goodman, a member of the federal defender panel, to represent Egwaoje.

Egwaoje next appeared before the district court at a December 7, 2001 status hearing, where he personally addressed the court to demand a speedy trial. After asking the government to forecast the trial's length and complexity, the district court set the case for trial on January 28, 2002, telling Egwaoje he would receive the speedy trial that he had requested. Because Goodman had been unable to attend the status hearing (another attorney was filling in for him), the district court informed Egwaoje that the January 28 trial date might prove inconvenient for his newly appointed attorney and, if so, may have to be adjusted slightly; however, the court would not allow Goodman to move the date much. The district court explained that at the latest, it expected to be able to bring Egwaoje to trial sometime in February. Egwaoje okayed the proposed schedule.

The following week, the district court held a hearing to consider Egwaoje's motion for release on bond pending trial. The court denied the motion. But Goodman attended the hearing and confirmed that he could accommodate a January 28 trial date. He also discussed the possibility that his client would plead guilty, but informed the court that he didn't have the discovery he needed to predict Egwaoje's criminal history

category accurately, which prevented his client from making an informed plea decision. The court asked the parties to investigate the matter further and report back within a week.

The parties returned to court on December 21, 2001, and Egwaoje promptly renewed his speedy-trial requests. After the court had agreed to hold another status hearing in two weeks because Goodman still had yet to receive the information he needed, Egwaoje interrupted, stating "I don't want no time. I want a speedy trial. I say that before." The court tried to explain to Egwaoje that he needed more time so that he could make an informed plea decision:

> The truth of the matter is, if I told you, "You are going to trial tomorrow," which I couldn't because today is a Saturday, your attorney would, with good reason, not be ready. You would be convicted and there would be absolutely no point to proceeding that quickly. We have got to have some time to check into [Egwaoje's criminal history category] in order to make a good decision.

Egwaoje insisted, "I am ready for trial," to which the court reiterated that, in its opinion, he was not, and that Egwaoje would be unhappy with the outcome of an unduly hurried trial. Seeking clarification, Goodman asked whether the January 28 trial date would be rescheduled, and the court indicated that while the trial may not proceed on the 28th, it would still begin around that date.

Goodman's relationship with Egwaoje deteriorated in the following weeks. At the next status hearing on January 3, 2002, Goodman informed the court that the parties were at an impasse in plea negotiations and, as such, requested that the case be scheduled for trial as soon as possible. The court reset the trial date for February 11, 2002. Egwaoje then addressed the court, "[Goodman] already told me he can't beat the case. He is not ready to go to trial." The court informed Egwaoje that his

lawyer's comments did not reflect his unpreparedness for trial, but rather were an assessment of the strength of Egwaoje's case. Regardless of his lawyer's advice, the court clarified that the decision to proceed to trial or plead guilty lay entirely with Egwaoje.

Within a month, and five days before the scheduled start of trial, Goodman moved the court to withdraw from representing Egwaoje. Like he had done previously with Sternberg, Egwaoje was refusing to meet and cooperate with Goodman. The court asked Egwaoje whether he wanted a new lawyer or wished to proceed without one. Egwaoje replied with a nonsequitur about his reasons for failing to meet with Goodman and about his insistence that the case proceed to trial. In response to further questioning, Egwaoje told the court that he wanted another attorney. The court then allowed Goodman to withdraw and told Egwaoje that it would appoint him another attorney but that under the circumstances it would have to move the trial date to March 18 or March 25 at the latest. Once again Egwaoje objected, "I still want my speedy trial."

On February 26, 2002, Egwaoje's third attorney, Richard Halprin, appeared on his behalf at yet another status hearing. Halprin told the court that he had not had the chance to meet with Goodman to discuss Egwaoje's case but that, regardless, he could be ready for trial on March 25. He also promised to inform the court should any problems arise between him and Egwaoje. Later that day, the court set the trial date for March 25, but then subsequently reset the date for April 2, 2002.

The Trial

The morning of his scheduled trial date — after having spent approximately eight months in custody during which he repeatedly and consistently petitioned the court for a speedy trial — Egwaoje changed his tune and told the court he wanted a sixty-day continuance: he claimed not to know that his trial was set to begin that day, he wanted to fire Halprin, and he

needed the additional time to prepare his defense. The court denied the request:

> No, I am not giving you sixty days. I have set the schedule. I have seen in you a course of conduct that has been nothing but an attempt to frustrate the government's effort to bring you to trial, to play games, to demand a speedy trial, and then to demand a continuance. This is your third lawyer.

Egwaoje then responded, "I am going to go *pro se.*" The court told Egwaoje that if he so wished he could represent himself, but it would be a foolish decision:

> If you wish to proceed *pro se,* you are entitled to do so. The United States Constitution guarantees your right to proceed as your own lawyer. If you wish to proceed as your own lawyer, I am required to admonish you that to represent yourself in any criminal case is a foolish act. You will almost certainly make significant tactical errors. You will almost certainly put yourself in a position where even if you had a lawful defense, you would be unable to present it in a coherent way. On top of it, you will not, I think, adequately preserve the record in this case if error has been made. So I strongly advise you against representing yourself. But I do tell you that that is your decision. You may choose to represent yourself, or you may choose to have Mr. Halprin represent you. The choice is yours.

If Egwaoje chose to represent himself, the court continued, it would request Halprin to remain in the courtroom to assist the defendant as standby counsel.

When Egwaoje replied by reducing the length of his original continuance demand to thirty days, the court informed him that regardless of his decision on whether to proceed *pro se,* his request for a continuance was going to be denied — his trial was starting that day. Egwaoje then denounced Halprin, telling

the court he no longer had a lawyer and reiterating that he wished to proceed *pro se*. The court granted Egwaoje's request after once again informing him of his foolishness, and Halprin agreed to stay on as standby counsel. The court recessed for two hours so that Egwaoje could prepare his defense.

The evidence introduced against Egwaoje at trial included (1) the teller's testimony that Egwaoje had sought to receive cash advances from her under the names Grant Abbott, Hugh Ball, and Eugene Kientzy; (2) bank surveillance photos showing Egwaoje at the teller counters where he tried to get cash using those aliases; (3) the arresting officer's testimony regarding Egwaoje's final attempt and the materials recovered from him upon his arrest; and (4) the testimony of two of the victims whose identity Egwaoje had stolen.

During the course of the trial, Egwaoje didn't object to any evidence that the government offered, was repeatedly admonished by the court for asking irrelevant questions and making argumentative statements during cross-examination, and presented no witnesses or evidence in his own defense. The jury convicted Egwaoje on both counts.

Post-trial Proceedings and Sentencing

Egwaoje filed a variety of *pro se* post-trial motions challenging his conviction, which the court treated as one motion for a new trial. After hearing from Egwaoje in support of his motion, the court made extensive factual findings. It concluded that Egwaoje (1) knew that his trial was scheduled to begin on April 2; (2) understood that he had no defense to the credit-card-fraud charges and so engaged in a pattern of obfuscation and obstructionism in his pretrial dealings with the court in an attempt to create an appealable issue; (3) fully understood the risk of going to trial, but lacking any defense, knowingly and intelligently waived his right to counsel and resolved to represent himself in the hope that he could personally invoke the jury's sympathy; and (4) made errors in

the course of his *pro se* representation, which was to be expected, but also reaped the benefit of being able to argue his story to the jury without having to testify and subject himself to the rigors of cross-examination. The court denied the motion.

At his sentencing hearing on July 12, 2002, Egwaoje made a motion for downward departure based on his status as a deportable alien. The district court determined that the applicable guideline range was between twenty-one and twenty-seven months and then sentenced Egwaoje to the highest sentence within the range plus three-years supervised release. It also ordered him to pay $38,985 in restitution. After the prosecutor noticed that the court had not announced its ruling on the downward-departure motion, the court stated, "The motion for downward departure was considered and denied; largely because if there is any ground for departure in this case, it is a ground for an upward departure rather than a downward one."

ANALYSIS

I. Right to Counsel

Under the Sixth Amendment, a criminal defendant has a constitutional right to waive the assistance of counsel and to represent himself at trial. *Faretta v. California,* 422 U.S. 806, 819-20 (1975). To ensure that the right of self-representation is properly invoked — or, conversely, that the right to counsel is properly waived — the Supreme Court has cautioned that a defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Id.* at 835 (quotations omitted). At its broadest, this directive can be read to support a two-prong inquiry: Did the district court warn the defendant of these dangers? And did the defendant understand that warning?

To guide that inquiry this Court has considered "(1) whether and to what extent the district court conducted a formal hearing

into the defendant's decision to represent himself, (2) whether there is other evidence in the record that establishes that the defendant understood the disadvantages of self-representation, (3) the background and experience of the defendant, and (4) the context of the defendant's decision to proceed *pro se.*" *United States v. Avery,* 208 F.3d 597, 601 (7th Cir. 2000) (citations omitted). This is not a formalistic, mechanical approach. Regardless of the consideration of these individual factors, our inquiry at all times is directed to the record as a whole and we ask whether that record supports a knowing and intelligent waiver. *Id.* If it does, we will uphold the district court's decision. *See United States v. Sandles,* 23 F.3d 1121, 1126 (7th Cir. 1994).

Egwaoje doesn't deny that he made an express statement to the court indicating his desire to proceed *pro se.* His principal contention on appeal is that the district court didn't do enough by way of a thorough and formal inquiry to ensure that his eyes weren't closed to the dangers of self-representation when he spoke. To ensure that his right was not waived blindly, Egwaoje would have us compare the inquiry the district court made in this case against the model inquiry laid out in the federal benchbook. Other courts of appeal have adopted this *Miranda*-style prophylactic approach, *see, e.g., United States v. McDowell,* 814 F.2d 245, 249-50 (6th Cir. 1987); we have not, *United States v. Moya-Gomez,* 860 F.2d 706, 732-33 & n.25 (7th Cir. 1988), and we reaffirm that position here. Although we have observed that a judge who wishes to insulate his or her ruling from an inevitable appeal — whether that decision is to honor the *pro se* request or deny it — would be prudent to conduct a thorough and formal inquiry into the defendant's understanding of the court's warnings, our attention ultimately is directed not at what was said or not said to the defendant but whether that defendant in fact understood the risks and made a knowing and intelligent waiver. *Id.; see also United States v. Hill,* 252 F.3d 919, 928 (7th Cir. 2001) ("[T]he question is not

whether the district judge used a check-off list but whether the defendant understood his options.").

Directing our inquiry to the totality of circumstances surrounding Egwaoje's purported waiver, we conclude it was made knowingly and intelligently. First, there is no question that the court satisfied its obligation to warn Egwaoje of the dangers of self-representation. The court told him it was a foolish act that was likely to result in significant errors at trial — errors that would be compounded by his failure properly to preserve the record for appeal. And there is nothing in the record that suggests that Egwaoje was incapable of understanding these repeated warnings.

Egwaoje's background and experience supports a finding of waiver. He was competent to stand trial. He graduated high school and attended two years of college. Moreover, for a time he successfully constructed and implemented a credit-card scheme that defrauded the target banks out of nearly $39,000. All these facts suggest that Egwaoje possessed normal intelligence and was capable of making informed — albeit unwise — decisions.

Egwaoje was no stranger to the criminal justice system either. His presentence investigation report outlines an extensive history of arrests and convictions for fraudulent schemes, which weighs in favor of finding a sufficient waiver. *See Moya-Gomez,* 860 F.2d at 736; *Hill,* 252 F.3d at 928. Egwaoje points out that this was his first trial and his first federal case. But a defendant's criminal history militates in favor of waiver not only because we would expect that a criminally accomplished accused would possess some familiarity with courtroom procedures; it also bears upon the defendant's understanding of the risks involved and the nature of the charges brought against him. The fact that Egwaoje pleaded guilty to and served time for theft and forgery charges resulting from prior false-identity and check-kiting schemes suggests that he was in a position to appreciate the seriousness

of the charges brought against him in this case. And that appreciation for the danger of his situation militates in favor of a knowing and intelligent waiver.

The strongest evidence supporting a finding of waiver, however, is that which suggests that Egwaoje was deliberately manipulating the system in an attempt to create an appealable issue. In ruling on his post-conviction motion for a new trial, the district court found as a matter of fact that Egwaoje engaged in a pattern of obfuscation and obstructionism in his pretrial dealings with the court by repeatedly demanding a speedy trial and then requesting a continuance, by routinely dismissing his attorneys for no good reason, and by accusing — without basis — the district court and the prosecutor of bias. It further found that this conduct was Egwaoje's only practical defense to charges that were so well supported by the evidence as to be indefensible on their merits. These findings, entitled to deference on appeal, support a conclusion that Egwaoje knew full well what he was doing when he asked to proceed *pro se*. *See Sandles*, 23 F.3d at 1129 ("[E]vidence of manipulation or intentional delay on the part of the defendant militates in favor of a knowing and intelligent waiver."); *see also United States v. Irorere*, 228 F.3d 816, 826 (7th Cir. 2000) ("[A] defendant may waive his right to counsel through his own contumacious conduct."); *United States v. Harris*, 2 F.3d 1452, 1455 (7th Cir. 1993) (finding that defendant waived right to counsel by firing fourth appointed attorney on the morning of trial when he was on notice that his fourth attorney would be the last the court would appoint for him); *United States v. Fazzini*, 871 F.2d 635, 642 (7th Cir. 1989) (finding implicit waiver after four court-appointed attorneys had been dismissed by the defendant or excused by the court). Given that we have found a defendant's behavior to evidence a knowing and intelligent choice in cases when the defendant never clearly stated that he intended to waive the right, *see, e.g., Fazzini*, 871 F.2d at 642, we surely are warranted in looking to Egwaoje's conduct to interpret the

genuineness of his express request to proceed *pro se.* Doing so, we concur with the district court that Egwaoje fully understood the risk of going to trial without counsel.

Egwaoje's fallback position — that the district court erred in not concluding that he lacked the ability to conduct his trial effectively and thereby preclude him from the attempt — is meritless. In determining the intelligence and willfulness of a purported waiver, we distinguish between an individual's competency to waive representation (which is a relevant inquiry, as discussed above) and his competency to conduct it (which is not). *See Godinez v. Moran,* 509 U.S. 389, 399 (1993) ("[T]he competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right,* not the competence to represent himself."). That is, we take precaution to ensure that a defendant who teeters on the precipice of self-representation is aware that he risks falling into oblivion; we do not contemplate whether he can survive the fall.

In sum, we conclude that Egwaoje made a knowing and intelligent waiver of his right to counsel when he elected to represent himself at trial.

II. Right to a Fair Trial

Knowing that the Supreme Court has already foreclosed a defendant who elects to represent himself from pursuing an ineffective-assistance claim on appeal, *see Faretta,* 422 U.S. at 834 n.46 ("[W]hatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'"), Egwaoje recasts what is essentially the same argument in the mold of a denial of his due process right to a fair trial, arguing that a readily apparent deficiency in performance at trial offends not only the defendant's rights but also undermines public confidence in the integrity of judicial proceedings.

Unfortunately for Egwaoje, we've already considered — and rejected — his argument. *See Moya-Gomez,* 860 F.2d at 741 (citing with approval and following the reasoning of *United States v. McDowell,* 814 F.2d 245, 251 (6th Cir. 1987), in which the Sixth Circuit rejected a fair-trial claim brought by a criminal defendant who had represented himself at trial). And if we were at all inclined to reconsider the issue, this case would not provide us with an appropriate opportunity. The errors cited by Egwaoje before this court do not amount to a constitutional violation. For example, Egwaoje cites his failure to make evidentiary objections as evidence of deficient performance; yet, he doesn't identify a single piece of evidence that was improperly admitted. Egwaoje's other errors — interrupting the court and witnesses, asking irrelevant questions — are equally trivial. Nothing he said or did during the course of the proceedings was serious enough to justify a mistrial, *cf. Harris,* 2 F.3d at 1454, 1456 (finding no abuse of discretion in denying a motion for mistrial when defendant, in the presence of the jury, had climbed onto counsel's table to exclaim "Kill me!" and "Shoot me!", attempted to flee the courtroom, and made unsubstantiated claims that he was the victim of racial discrimination), and to the extent that his behavior drew the court to admonish him, he was warned repeatedly of that possibility.

Most damning to his fair-trial claim, however, would be Egwaoje's inability to show that the jury failed to determine his guilt fairly and reliably. *Cf. United States v. Farhad,* 190 F.3d 1097, 1105 (9th Cir. 1999) (defining a "fair trial" as a "proceeding that is designed to maximize the likelihood of a fair and reliable determination of guilt or innocence"). Given the overwhelming evidence implicating his guilt — which included the eye-witness testimony of the bank teller, the surveillance photos placing him at the scene, the arresting officer's testimony, and the credit cards and fake IDs recovered

from Egwaoje upon his arrest — we fail to see how Egwaoje could argue that the jury's verdict was unreliable.

III. Denial of Continuance

Egwaoje's remaining claims — that the district court abused its discretion in denying his request for a continuance and that the district court failed to consider his departure motion — are also without merit and may be disposed of with minimal discussion.

A district court's exercise of its discretion in scheduling trials and granting or denying continuances is "almost standardless." *Moya-Gomez,* 860 F.2d at 742 (quoting *United States v. Rodgers,* 755 F.2d 533, 539 (7th Cir. 1985)); *see also United States v. Davis,* 604 F.2d 474, 480 (7th Cir. 1979) (denial of continuances are "virtually unreviewable"); *cf. Morris v. Slappy,* 461 U.S. 1, 11-12 (1983) ("[B]road discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel." (quotation omitted)).

In light of (1) the district court's finding that Egwaoje knew his trial was scheduled to begin the morning of April 2; (2) Egwaoje's repeated requests that he be given a speedy trial; (3) the fact that, despite those requests, the trial date had already been rescheduled four times in large part because Egwaoje chose to fire his attorneys; (4) the unlikelihood that any prejudice resulted from the denial given the strength of the government's case and the lack of any viable defense; (5) the relative simplicity of the charges brought against him; (6) the fact that before trial Egwaoje chose not to avail himself of the opportunity to access his discovery materials through his attorneys; and (7) the inconvenience and burden to the court, the government, and the witnesses to reschedule a trial that was set to begin that day, it would be beyond reason to find that the district court abused its discretion in denying Egwaoje's

request. *See United States v. Farr,* 297 F.3d 651, 657 (7th Cir. 2002) ("[W]e refuse to even consider, much less adopt, a rule that might suggest that a trial court should tolerate a calculating and mischievous defendant and grant indefinite continuances to a defendant who refuses to cooperate with his attorney."); *Avery,* 208 F.3d at 603 ("[T]he situation about which [the defendant] now complains was brought about entirely by his own actions. His decision to dismiss his lawyer on the eve of trial and proceed *pro se* was a decision he made at his own peril.").

IV. Downward Departure Motion

Relying upon *United States v. Farouil,* 124 F.3d 838, 847 (7th Cir. 1997), Egwaoje filed a motion for downward departure at sentencing, arguing that his deportable alien status would result in an unusual or exceptional hardship in his conditions of confinement. The district court in a summary ruling stated that it "considered and denied" Egwaoje's motion. On appeal, Egwaoje argues that we cannot tell from this ruling whether the district court recognized it had the authority to depart, but declined in its discretion to do so, or whether it thought it lacked the authority to depart at all. Egwaoje argues that we must vacate his sentence and remand to the district court for more specific findings on his motion.

This court has often stated that "discretionary decisions not to depart are not reviewable." *United States v. Chavez-Chavez,* 213 F.3d 420, 421 (7th Cir. 2000) (citation omitted). As Egwaoje's motion points out, we stated in *Farouil* that in an appropriate case, a defendant may qualify for a departure based on his status as a deportable alien. 124 F.3d at 847. Such departures are reasonable because a deportable alien's conditions of imprisonment may be more severe, *see United States v. Guzman,* 236 F.3d 830, 834 (7th Cir. 2001), and because an alien must face the harsh consequences of deportation, *see United States v. Bautista,* 258 F.3d 602, 607 (7th Cir. 2001). We presume that district court judges know

and understand the law, and we will not disturb that presumption by mere inference. *See United States v. Kezerle,* 99 F.3d 867, 870 (7th Cir. 1996).

Here, the district court's ruling may have been brief, but it was clear. The court stated that it "considered" Egwaoje's motion before denying it. We will take that language at face value to mean that the court recognized the *Farouil-Guzman-Bautista* line of cases granting it authority to depart, but that in considering Egwaoje's specific request, it declined to exercise its discretion to do so. Hence, we lack the jurisdiction to consider the exercise of this discretion on appeal.

CONCLUSION

For the foregoing reasons, we **AFFIRM** both Egwaoje's conviction and sentence.

APPENDIX B

AO 245B (Rev. 3/01) Judgment in a Criminal Case Sheet 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

[Docketed Jul 19, 2002]

UNITED STATES OF AMERICA
v.
BENJAMIN I. EGWAOJE

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After Nov 1, 1987)

Case Number: 01 CR 655-1
Benjamin I. Egwaoje (Richard A. Halprin)
Defendant's Attorney

THE DEFENDANT:

□ pleaded guilty to count(s)_____

□ pleaded nolo contendere to count(s) _____ which was accepted by the court

■ was found guilty on count(s) one and two after a plea of not guilty

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section:	Nature of Offense:	Date Offense Concluded:	Count Number(s):
18:1029(a)(2)	Trafficking in counterfeit devices	7/17/2001	1
18:1029(b)(1)	Attempted trafficking in counterfeit devices	7/17/2001	2

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

□ The defendant has been found guilty on count(s) _____

□ Count(s)_____ □ is □ are dismissed on the motion of the United States

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstance

Defendant's Soc. Sec. No.: xxx-xx-xxxx
Defendant's Date of Birth: 03-02-1960
Defendant's USM No.: 13769-424
Defendant's Residence Address:
14242 North Sheridan, Apt 402
Chicago, IL 60613
Defendant's Mailing Address:
MCC
71 W. Van Buren Street
Chicago, IL 60605

July 12, 2002
Date of Imposition of Judgment

/s/ James B. Zagel
Signature of Judicial Officer

James B. Zagel, U.S. District Judge
Name and Title of Judicial Officer

July 18, 2002
Date

AO 245B (Rev. 3/01) Judgment in Criminal Case
Sheet 2—Imprisonment

DEFENDANT: EGWAOJE, Benjamin
CASE NUMBER: 01 CR 655-1

IMPRISONMENT

The defendant is herEby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total total term of TWENTY-SEVEN (27) MONTHS on each of counts 1 and 2. Said term to be served concurrently.

■ The court makes the following recommendations to the Bureau of Prisons: defendant be permitted to participate in a comprehensive drug treatment program while incarcerated.

■ The defendant is remanded to the custody of the United States Marshal.

□ The defendant shall surrender to the United States Marshal for the district:

□ at _____ □ a.m. □ p.m. on _____

□ as notified by the United States Marshal.

□ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

□ before 2 p.m. on _____

□ as notified by the United States Marshal.

□ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows: _____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 3/01) Judgment in a Criminal Case
Sheet 3—Supervised Release

DEFENDANT: EGWAOJE, Benjamin
CASE NUMBER: 01 CR 655-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term THIRTY-SIX (36) MONTHS on each of counts 1 and 2. Said term to be served concurrently. The defendant is to be surrendered to a duly-authorized immigration and naturalization official for deportation. If ordered deported, the defendant shall not reenter the United States without the express written permission of the Attorney General of the United States.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and xxxxx periodic drug tests thereafter not to exceed 104 tests per year.

□ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

■ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay as such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

AO 245B (Rev. 3/01) Judgment in a Criminal Case
Sheet 6—Criminal Monetary Penalties

Judgment—Page 4 of 5

DEFENDANT: EGWAOJE, Benjamin
CASE NUMBER: 01 CR 655-1

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment:	Fine:	Restitution:
TOTALS	$200.00	$	$38,985.00

□ The determination of restitution is deferred until ____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

□ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee:	*Total Amount of Loss:	Amount of Restitution Ordered:	Priority Order or Percentage of Payment:
Motorola Employees CU	$11,500	$11,500	
John Rabaioli	5,300	5,300	
Janice Schmidt	22,185	22,185	
TOTALS	$38,985.00	$38,985.00	

□ If applicable, restitution amount ordered pursuant to plea bargain $_____

□ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

■ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

- ■ the interest requirement is waived for the □ fine and/or ■ restitution
- □ the interest requirement for the □ fine and/or □ restitution is modified as follows:

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

AO 245B (Rev. 3/01) Judgment in a Criminal Case
Sheet 6—Criminal Monetary Penalties

DEFENDANT: EGWAOJE, Benjamin
CASE NUMBER: 01 CR 655-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ■ Lump sum payment of $39,185.00 due immediately, balance due
- □ not later than _____, or
- □ in accordance with □ C, □ D, or □ E below; or

B □ Payment to begin immediately (may be combined with □ C, □ D, or □ E below); or

C □ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____(e.g., 30 or 60 days) after the date of this judgment; or

D □ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E □ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

□ Joint and Several
Defendant Name, Case Number, and Joint and Several Amount:_____

□ The defendant shall pay the cost of prosecution.

□ The defendant shall pay the following court cost(s):

□ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Supreme Court, U.S.
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(2)

No. 03-691

In the Supreme Court of the United States

BENJAMIN EGWAOJE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the court of appeals correctly considered the totality of the circumstances in determining that petitioner knowingly and intelligently waived his right to counsel, rather than requiring that the district court have conducted a specific formal colloquy with petitioner before permitting him to represent himself at trial under *Faretta* v. *California*, 422 U.S. 806 (1975).

2. Whether *Faretta* should be overruled.

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In the Supreme Court of the United States

No. 03-691

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-17a) is reported at 335 F.3d 579.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2003. On September 10, 2003, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including November 6, 2003, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of using unauthorized credit cards to

obtain cash advances from different banks in an amount in excess of $1000, in violation of 18 U.S.C. 1029(a)(2), and of attempting to obtain a cash advance with an unauthorized credit card, in violation of 18 U.S.C. 1029(b)(1). He was sentenced to 27 months of imprisonment, to be followed by three years of supervised release, and was ordered to pay $38,985 in restitution. The court of appeals affirmed. Pet. App. 2a-17a.

1. In June and July 2001, petitioner withdrew thousands of dollars in cash from several Chicago-area banks by using credit cards he had obtained through fraudulent means. Petitioner obtained the credit cards by sending fraudulent letters to the credit card issuers in which he requested that the addresses of the legitimate account holders be changed and that new replacement cards be sent to an address effectively controlled by petitioner. Once in possession of the credit cards, petitioner would visit Citibank and Bank One branches in Chicago and request a cash advance by presenting one of the credit cards and some form of fictitious identification. Before his arrest, petitioner obtained a total of $38,985 through such means. Gov't C.A. Br. 2.

On July 17, 2001, petitioner attempted to obtain a cash advance at a Citibank branch. A teller recognized him from prior visits that petitioner had made to the bank to request cash advances under different names. The teller stalled petitioner until the police arrived on the scene. The officers arrested petitioner. At the time of his arrest, petitioner had a fraudulently obtained credit card and fake identification cards in the name of the credit card holder. Gov't C.A. Br. 3.

2. a. On August 15, 2001, a grand jury returned an indictment charging petitioner with two counts of credit card fraud. Petitioner retained counsel. At a

hearing before the district court on November 5, 2001, petitioner's counsel moved to withdraw from the case because petitioner had twice refused to meet with him and "substantial conflicts" had arisen between them. Pet. App. 4a. The district court granted counsel's motion and appointed petitioner counsel from the Federal Defender Panel. *Ibid.*

At the next status hearing on December 7, 2001, petitioner demanded a speedy trial. 12/7/01 Tr. 3. One week later, during a bond hearing, petitioner's counsel discussed the possibility of a plea agreement, but explained that the government's lack of certainty about petitioner's criminal history presented an impediment. 12/14/01 Tr. 5. On December 21, 2001, the parties returned to court and discussed the sentencing guidelines that would likely apply to the case. The government informed the court that petitioner had three prior convictions, but petitioner contended that only two of his prior convictions should be counted for purposes of calculating his criminal history points. 12/21/01 Tr. 9-10. After the district court recommended to petitioner's counsel that he should consider a "disposition[] short of a trial," *id.* at 10, petitioner stated that he would not accept a plea bargain and that he was ready for trial, *id.* at 11.

On February 6, 2002, five days before the scheduled trial date, petitioner's second counsel moved to withdraw from the case. Counsel explained that petitioner was refusing to meet or cooperate with him to prepare for trial. 2/6/02 Tr. 2-3. After petitioner complained that counsel had told him he lacked a viable defense and stated that he wanted a lawyer who would "represent[]" him at trial, the district court allowed counsel to withdraw and agreed to appoint petitioner his third lawyer. *Id.* at 3-4. The court informed petitioner that,

while it would "appoint a lawyer who will represent you[,] [t]his does not mean I will appoint a lawyer who agrees with you. I will not necessarily appoint a lawyer whose professional judgment believes there is a defense." *Id.* at 5.

The district court rescheduled the trial date to April 2, 2002, to allow petitioner's newly appointed counsel sufficient time to prepare. When that day arrived, petitioner told the district court that counsel "is not going to be my lawyer," 4/2/02 Tr. 3, and that "I am going to go *pro se*," *id.* at 4. Petitioner then requested 60 additional days to prepare for trial. *Id.* at 3-4. The court denied petitioner's request for a continuance, stating:

> I have set the schedule. I have seen in you a course of conduct that has been nothing but an attempt to frustrate the government's effort to bring you to trial, to play games, to demand a speedy trial, and then to demand a continuance. This is your third lawyer.

Id. at 4.

The district court informed petitioner that he had the right to proceed as his own lawyer, but "strongly advise[d]" him against doing so. 4/2/02 Tr. 4. The court explained:

> If you wish to proceed *pro se*, you are entitled to do so. The United States Constitution guarant[ees] your right to proceed as your own lawyer. If you wish to proceed as your own lawyer, I am required to admonish you. Even if I weren't required, I would admonish you that to represent yourself in any criminal case is a foolish act. You will almost certainly make significant tactical errors. You will almost certainly put yourself in a position where even if you had a lawful defense, you would be

> unable to present it in a coherent way. On top of it, you will not, I think, adequately preserve the record in this case if error has been made. So I strongly advise you against representing yourself. But I do tell you that that is your decision. You may choose to represent yourself, or you may choose to have Mr. Halprin represent you. The choice is yours.

Id. at 4-5. After the court advised petitioner again that proceeding *pro se* "is a foolish thing to do," *id.* at 6, petitioner reaffirmed that he would represent himself, *id.* at 7. The court appointed petitioner's former counsel as standby counsel. *Ibid.*

b. At trial, the government called several witnesses, including the police officer who arrested petitioner and found false identifications on his person; the Citibank teller from whom petitioner had attempted to get cash advances under the names of Grant Abbott, Hugh Ball, and Eugene Kientzy; and Abbott and Kientzy, whose identities petitioner had stolen. The government also introduced bank surveillance photos of petitioner standing at teller counters as he tried to obtain cash in the names of his victims. Petitioner presented no witnesses or evidence in his defense. He was convicted on both counts. Pet. App. 8a.

c. Petitioner filed a number of post-trial motions, which the district court treated as a request for a new trial. Pet. App. 8a. The court denied petitioner's request, finding, *inter alia*, that: (1) petitioner "understood that there was, in fact, no practical defense" to the charges, 6/26/02 Tr. 11, and "knew from the beginning that no lawyer could help him because no lawyer could make a defense or an attack on the evidence in this case," *id.* at 12; (2) petitioner falsely attempted "to portray himself as badly served by counsel," *id.* at 11;

(3) petitioner falsely demanded a speedy trial, seeking in reality "to forestall the day of reckoning because the longer he waited for trial the longer he remained in the United States," *id.* at 12; (4) petitioner's "decision to proceed *pro se* was knowing and voluntary," as he "fully understood the risk[s] of going to trial without counsel[,] and he assumed them in the hope that jury sympathy or appellate review would somehow save him," *id.* at 13; and (5) petitioner sought to "manipulate[] the system to [his] own benefit," *id.* at 14.

3. The court of appeals affirmed. Pet. App. 2a-17a. The court of appeals rejected petitioner's contention that the district court erred in permitting him to proceed *pro se*, concluding that petitioner "made a knowing and intelligent waiver of his right to counsel when he elected to represent himself at trial." *Id.* at 13a. In so finding, the court recognized at the outset of its analysis that "the Supreme Court has cautioned that a defendant 'should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.'" *Id.* at 9a (quoting *Faretta* v. *California*, 422 U.S. 806, 835 (1975)).

The court of appeals emphasized that the determination whether a defendant has made a knowing and intelligent waiver "at all times is directed to the record as a whole." Pet. App. 10a. In addition, the court identified several factors it takes into account in evaluating whether a waiver was knowing and intelligent: "(1) whether and to what extent the district court conducted a formal hearing into the defendant's decision to represent himself, (2) whether there is other evidence in the record that establishes that the defendant understood the disadvantages of self-representation, (3) the background and experience of the defendant,

and (4) the context of the defendant's decision to proceed *pro se*." *Id.* at 9a-10a (quoting *United States* v. *Avery*, 208 F.3d 597, 601 (7th Cir. 2000)). Observing that "[t]his is not a formalistic, mechanical approach," *id.* at 10a, the court of appeals emphasized that "[r]egardless" of "these individual factors," the "inquiry at all times is directed to the record as a whole," *ibid.*[1]

After examining "the totality of circumstances surrounding [petitioner's] purported waiver," the court of appeals held that the waiver of counsel "was made knowingly and intelligently." Pet. App. 11a. The court found first that "there is no question that the [district] court satisfied its obligation to warn [petitioner] of the dangers of self-representation," noting that the court told petitioner that self-representation was "a foolish act that was likely to result in significant errors at trial." *Ibid.* The court found next that the record lacked any suggestion that petitioner "was incapable of understanding" the district court's "repeated warnings." *Ibid.* As the court explained, petitioner graduated high school and attended two years of college, he succeeded in temporarily defrauding banks of nearly $39,000, and he was "no stranger to the criminal justice system." *Ibid.*

The court of appeals further found that "[t]he strongest evidence supporting a finding of waiver * * * is that which suggests that [petitioner] was deliberately manipulating the system in an attempt to create an appealable issue." Pet. App. 12a. In so concluding, the

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[1] The court stated that, although a district judge may "conduct a thorough and formal inquiry into the defendant's understanding of the court's warnings," the court's "attention ultimately is directed not at what was said or not said to the defendant but whether that defendant in fact understood the risks and made a knowing and intelligent waiver." Pet. App. 10a.

court credited the district court's findings that petitioner "engaged in a pattern of obfuscation and obstructionism in his pretrial dealings with the court," and that petitioner's misconduct was his "only practical defense to charges that were so well supported by the evidence as to be indefensible on their merits." *Ibid.* The court therefore "concur[red] with the district court that [petitioner] fully understood the risk of going to trial without counsel." *Id.* at 13a.

The court of appeals also rejected petitioner's "fallback position" that the district court should have precluded him from proceeding *pro se* because he lacked the ability to conduct the trial effectively. Pet. App. 13a. The court held that, under *Godinez* v. *Moran*, 509 U.S. 389, 399 (1993), petitioner's competence to represent himself is irrelevant to the question whether he executed a proper waiver of his right to counsel. *Ibid.*

ARGUMENT

Petitioner challenges the court of appeals' conclusion that he knowingly and voluntarily waived his right to counsel at trial. In particular, petitioner argues that the "warning that [he] received was inadequate to enable him knowingly and intelligently to waive his right to counsel." Pet. 16. That contention is incorrect, and further review is not warranted in this case.

1. a. In *Faretta* v. *California*, this Court held that the Sixth Amendment guarantees a criminal defendant the right to forgo counsel and conduct his own defense. Because a defendant who represents himself "relinquishes * * * many of the traditional benefits associated with the right to counsel," a defendant seeking to proceed *pro se* "must 'knowingly and intelligently'" waive that right. 422 U.S. at 835 (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464-465 (1938)). To ensure that an

election to forgo counsel satisfies that standard, the Court stated that a defendant who is contemplating proceeding *pro se* "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Ibid.* (quoting *Adams* v. *United States*, 317 U.S. 269, 279 (1942)). In *Faretta*, this Court found that the defendant had validly waived his right to counsel, where the defendant "clearly and unequivocally" expressed a desire to proceed *pro se*; the record showed that he was "literate, competent, and understanding"; and the trial judge had warned him "that he thought it was a mistake not to accept the assistance of counsel, and that [the defendant] would be required to follow all the 'ground rules' of trial procedure." *Id.* at 835-836.

b. Although it is well-established that a defendant may not relinquish his right to counsel under the Sixth Amendment unless the record establishes that he knowingly and intelligently waived it, courts of appeals have taken somewhat different approaches in ensuring that a defendant's waiver is knowing and intelligent.

The majority of courts of appeals, including the Seventh Circuit, have concluded that while it may be generally advisable for district courts to conduct particularized record inquiries in determining whether a defendant is aware of the dangers of self-representation, the determination whether a defendant knowingly and intelligently waived his right to counsel ultimately should be based on the record as a whole, rather than a formalistic inquiry into "what was said or not said to the defendant." Pet. App. 10a; see also, *e.g.*, *United States* v. *Turner*, 287 F.3d 980, 982-984 (10th Cir. 2002); *United States* v. *Singleton*, 107 F.3d 1091, 1098-1099 (4th Cir.), cert. denied, 522 U.S. 825 (1997);

United States v. *Stewart*, 20 F.3d 911, 917 (8th Cir. 1994); *United States* v. *Campbell*, 874 F.2d 838, 845-847 (1st Cir. 1989); *United States* v. *Tompkins*, 623 F.2d 824, 827-829 (2d Cir. 1980).

Some circuits have required a district court to conduct an on-the-record inquiry into a defendant's awareness of the risks of self-representation. See, *e.g.*, *United States* v. *Stubbs*, 281 F.3d 109, 118 (3d Cir. 2002) (district court "should only accept a waiver [of the right to counsel] after making a searching inquiry sufficient to satisfy the court that the defendant's waiver was understanding and voluntary."); *United States* v. *Bailey*, 675 F.2d 1292, 1300-1301 (D.C. Cir.) (calling on district courts to "mak[e] clear on the record the awareness by defendants of the dangers and disadvantages of self-representation as to which the Supreme Court in *Faretta* has voiced its concern"), cert. denied, 459 U.S. 853 (1982).

The Sixth Circuit, on which petitioner places principal reliance (see Pet. 10-12, 16), has gone a step further and held that district courts should follow the "model inquiry" in the Federal Justice Center, *Bench Book for United States District Judges* (4th ed. 1996) before accepting a defendant's waiver of his right to counsel. *United States* v. *McDowell*, 814 F.2d 245, 249-250 (6th Cir.), cert. denied, 484 U.S. 980 (1987). In *McDowell*, however, the Sixth Circuit did not hold that such an inquiry was compelled by the Sixth Amendment. The district court in *McDowell* did not engage in the sort of "model inquiry" that the Sixth Circuit—in invoking its "supervisory powers"—ruled should be conducted by district courts in "future" cases. *Ibid.* Nonetheless, the court of appeals in *McDowell* held that "a fair reading of the record as a whole" established that the defendant knowingly and intelligently waived his right to counsel,

and therefore rejected the defendant's Sixth Amendment argument on appeal. *Id.* at 249.

c. The fact that some courts of appeals have taken different approaches in giving effect to *Faretta* does not support the petition for certiorari in this case. All the circuits recognize that this Court's decision in *Faretta* establishes that a defendant "should be made aware of the dangers * * * of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" 422 U.S. at 835. Although courts have called for different approaches in determining whether a defendant's waiver of his right to counsel is made with "eyes open," this Court's decision in *Faretta*—and the Sixth Amendment to the Constitution—is being faithfully applied in every circuit, including the Seventh Circuit.

Moreover, even assuming the divergence of authority in the lower courts warranted consideration by this Court, this case would be an ill-suited vehicle in which to address it. As the court of appeals concluded, the record conclusively establishes that petitioner's waiver of his right to counsel was knowing and intelligent. See Pet. App. 11a-13a. Indeed, here, as in *Faretta*, the record establishes that the defendant "clearly and unequivocally declared to the trial judge that he wanted to represent himself"; the record establishes that the defendant was "literate, competent, and understanding"; and the record establishes that "[t]he trial judge * * * warned [the defendant] that he thought it was a mistake not to accept the assistance of counsel." *Faretta*, 422 U.S. at 835-836; see Pet. App. 12a-13a.

While in the Sixth Circuit a district court would have been required to engage in a more formulaic inquiry in warning a defendant of the hazards of self-representation, the record in this case leaves no reasonable doubt

that the command of *Faretta* was fulfilled. The district court advised petitioner of "the dangers and disadvantages of self-representation," and petitioner chose to proceed *pro se* "with eyes open." *Faretta*, 422 U.S. at 835. As discussed above, the district court "strongly advise[d]" petitioner against forgoing counsel; told him that self-representation "in any criminal case is a foolish act"; warned him that he would "almost certainly make significant tactical errors"; warned him that, even if he "had a lawful defense," he "almost certainly" would fail "to present it in a coherent way"; and warned that, "[o]n top of it, you will not, I think, adequately preserve the record in this case if error has been made." 4/2/02 Tr. 4-5. During the same hearing, the court reiterated that proceeding *pro se* would be "a foolish thing to do." *Id.* at 6. Accordingly, the record in this case firmly supports the lower courts' findings that petitioner knowingly and voluntarily waived his right to counsel.

d. This case is an unsuitable vehicle to review the conflict alleged by petitioner for an even more fundamental reason. Apart from any obligation to warn a defendant about the dangers of self-representation in any particular or formalistic manner, it is well-established that a defendant may not use the Sixth Amendment right of self-representation to manipulate the trial system. See *Faretta*, 422 U.S. at 834-835 & n.46 ("The right of self-representation is not a license to abuse the dignity of the courtroom."); *United States* v. *Frazier-El*, 204 F.3d 553, 560 (4th Cir. 2000) ("The right [to self-representation] does not exist * * * to be used as a tactic for delay; for disruption; for distortion of the system.") (citations omitted).

Similarly, most lower courts have recognized that a district court may infer that a defendant has knowingly and intelligently waived his right to counsel when the

court finds that the defendant seeks to discharge his attorney in order to delay or to sabotage the trial. See, *e.g.*, *Cordova* v. *Baca*, 346 F.3d 924, 929 (9th Cir. 2003) ("[M]anipulation presupposes knowledge and an ability to work around the rules, and a defendant who knows enough to manipulate will very likely be one whose waiver will be deemed voluntary, despite any defect in the admonitions given by the court."); see also *Nelson* v. *Alabama*, 292 F.3d 1291, 1297-1298 (11th Cir. 2002) (citing *Fitzpatrick* v. *Wainwright*, 800 F.2d 1057, 1068 (11th Cir. 1986)); *United States* v. *Irorere*, 228 F.3d 816, 826-828 (7th Cir. 2000); *United States* v. *Kneeland*, 148 F.3d 6, 11 (1st Cir. 1998); *United States* v. *Kelm*, 827 F.2d 1319, 1322 (9th Cir. 1987); *McQueen* v. *Blackburn*, 755 F.2d 1174, 1178 (5th Cir.), cert. denied, 474 U.S. 852 (1985); cf. *Buhl* v. *Cooksey*, 233 F.3d 783, 796 (3d Cir. 2000).[2] In addition, some lower courts have found that, when a defendant moves for self-representation in order to delay or manipulate the trial, the district court may find that the defendant waived his right to counsel without conducting a *Faretta* inquiry. *United States* v. *Hughes*, 191 F.3d 1317, 1323-1324 (10th Cir. 1999), cert. denied, 529 U.S. 1022 (2000).

As the court of appeals emphasized, the district court in this case found that petitioner sought to deliberately manipulate the system by engaging in "a pattern of obfuscation and obstructionism." Pet. App. 12a. Those findings are "entitled to deference on appeal," *ibid.*, and by this Court. And the findings in themselves "support

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[2] In *Buhl*, the Third Circuit concluded that there were no "dilatory motives" on the part of defendant, but nonetheless went on to state, in dicta, that "we do not suggest that a finding of such motives would negate the court's duty to inquire under *Faretta*." 233 F.3d at 796.

a conclusion that [petitioner] knew full well what he was doing when he asked to proceed *pro se*." *Ibid.*[3] The conclusive record evidence that petitioner sought to deliberately manipulate the system is sufficient reason to deny the petition for certiorari in this case.

2. Petitioner also suggests (Pet. 16-26) that the petition should be granted so that the Court may revisit *Faretta*. That contention also should be rejected.

This Court has on several occasions reaffirmed its decision in *Faretta*. In *McKaskle* v. *Wiggins*, 465 U.S. 168, 173-174 (1984), the Court reaffirmed the rule announced in *Faretta*, while holding that the Constitution does not vest the defendant with an absolute right to preclude the participation of standby counsel. See *id.* at 176-188. In *Godinez* v. *Moran*, 509 U.S. 389, 399-400 (1993), the Court again reaffirmed *Faretta*. In *Martinez* v. *Court of Appeal of California*, 528 U.S. 152 (2000), this Court held that the Constitution does not vest criminal defendants with a right to represent themselves *on appeal*. The Court held that the justifications for the *Faretta* rule either do not apply at all, or apply with significantly reduced force, to the appellate phase of criminal proceedings. See *id.* at 156-162. But *Martinez* did not concern the right of self-representation *at trial* and, therefore, did not affect the continuing vitality of *Faretta* with regard to the right of self-representation at trial. Nor is there any evidence in the decision below or other cases that the courts of

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[3] As the court of appeals explained, the district court's findings that petitioner sought to deliberately manipulate the system were corroborated by its conclusion that "this conduct was [petitioner's] only practical defense to charges that were so well supported by the evidence as to be indefensible on their merits." Pet. App. 12a; see *id.* at 14a-15a (discussing the "overwhelming evidence" of petitioner's guilt).

appeals are laboring in any "lingering uncertainty about the validity of *Faretta* in the wake of * * * *Martinez*." Pet. 23.

Petitioner provides no persuasive reason for the Court to reconsider *Farretta*, much less to do so in a case, such as this, in which the lower courts found that the defendant sought to deliberately manipulate the system by *invoking* his right to self-representation, Pet. App. 12a, and in which there was "overwhelming evidence" of the defendant's guilt, *id.* at 14a.[4] Petitioner claims (Pet. 25) that he did not perform as an effective advocate at trial, and that as a result his conviction was unfairly obtained. The court of appeals correctly rejected that argument, however, when petitioner framed it as "a denial of his due process right to a fair trial." See Pet. App. 13a-15a.[5]

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[4] Petitioner contends (Pet. 24 & n.5) that permitting self-representation will undermine confidence in the criminal justice system, citing the prosecution of Zacarias Moussaoui as an example of self-representation run amok. But "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct," *Faretta*, 422 U.S. at 834 n.46, as the district court in the Moussaoui case did on November 14, 2003.

[5] Petitioner asserts (Pet. 25) that, while he "may have been competent to stand trial"—and thus competent to waive his right to counsel under *Godinez*—"it was clear" that "he was unlikely to be able to mount a competent *defense*." But the district court found that "even with the best lawyer the result would have been the same," 6/26/02 Tr. 13, because petitioner did not have a viable defense, *id.* at 11; see also Pet. App. 14a-15a. In addition, as the court of appeals explained, petitioner's educational background and experience with the criminal justice system (see 12/21/01 Tr. 9-10) belie the notion that he was incapable of conducting his own defense, albeit not with the skill of a trained attorney.

3. There is no reason to hold this petition pending the disposition in *Iowa* v. *Tovar*, No. 02-1541 (argued Jan. 21, 2004). *Tovar* involves the waiver of the right to counsel by a defendant who pleaded guilty. As petitioner himself acknowledges (Pet. 27), the Court's decision in *Tovar* is unlikely to "address the requirements for waiver of the right to counsel *at trial*, much less the ongoing validity of the right to *self-representation* at trial." In addition, in its amicus brief in *Tovar*, the United States has argued that substantially different standards should apply to the waiver of counsel at trial and the waiver of counsel for purposes of entering a guilty plea. Regardless of what standards govern a defendant's waiver of counsel at the *plea stage*, those standards could not affect the validity of petitioner's conviction in this case. Petitioner retained the assistance of counsel at the plea stage and declined to plead guilty.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 03-691

In the Supreme Court of the United States

BENJAMIN EGWAOJE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

In its brief in opposition, the government makes two concessions that are vital to the disposition of this petition for certiorari. First, the government concedes that the federal courts of appeals have adopted different standards for determining whether a defendant has validly waived his right to counsel, with some courts of appeals requiring trial judges to conduct a detailed inquiry before finding a waiver and others (like the court below) allowing the validity of a waiver to be inferred from a defendant's conduct. Although the government contends that "[t]he fact that some courts of appeals have taken different approaches * * * does not support the petition for certiorari in this case," Opp. 11, the government freely acknowledges that at least one circuit would have reached a different outcome on these facts, *see id.* When a right as fundamental as the Sixth Amendment right to the assistance of counsel is involved, such a clear split in the circuits merits this Court's review.

Second, the government effectively concedes that this Court's recent decision in *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000), cast substantial doubt on the reasoning of *Faretta v. California*, 422 U.S. 806 (1975), which established the underlying Sixth Amendment right to self-representation at trial. Although the government does note that the *holding* of *Martinez* was that a criminal defendant does not have the right to represent himself on appeal, *see* Opp. 14, it is clear that the *reasoning* of *Martinez* swept far more broadly — so much so that three Justices each felt compelled to write separately to indicate either that they were unwilling to reexamine *Faretta*, or that they believed it was unnecessary to do so in that case. Unlike *Martinez*, this case squarely presents the Court with the opportunity to reconsider *Faretta*. Notably, in its brief, the government offers no defense of *Faretta*'s much-criticized rule. The time has come for this Court to revisit, and reverse, *Faretta*. Certiorari should be granted.

REASONS FOR GRANTING THE PETITION

A. THE CIRCUITS ARE SPLIT ON THE REQUISITE INQUIRY BEFORE A DEFENDANT CAN VALIDLY WAIVE HIS RIGHT TO COUNSEL AT TRIAL.

1. The government repeatedly (and correctly) notes that, in *Faretta*, the Court observed that a defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." 422 U.S. at 835 (internal quotation omitted). But the government errs by suggesting that the "colloquy" between the trial judge and defendant here — such as it was — was comparable to the colloquy held to be sufficient in *Faretta*. *See* Opp. 11. In sanctioning that colloquy, the Court not only noted (as the government emphasizes, *see id.*) that "[t]he trial judge * * * warned [the defendant] that he thought it was a mistake not to accept the assistance of counsel," *Faretta*, 422 U.S. at 835-36, but also emphasized (as the government conspicuously fails to note, *see* Opp. 11) that "[t]he trial judge * * * warned [the defendant] * * * that [he] would be required to follow all the 'ground rules' of trial procedure," *Faretta*, 422 U.S. at 835-36.[1] Because the district court in this case failed to engage even in a "*Faretta* inquiry," Opp. 13 — much less the more detailed inquiry required by some courts of appeals in the wake of *Faretta* — this Court's intervention is warranted.

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[1] The *Faretta* Court also noted that "[the defendant] clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel," 422 U.S. at 835, and that "the record affirmatively shows that [the defendant] was literate, competent, and understanding," *id.* As to the first consideration, we note only that there is some question as to whether Mr. Egwaoje wanted to proceed *pro se*, or whether he simply wanted a new appointed lawyer. *See* Pet. 5-6 & n.1. As to the second, this Court subsequently made clear that a defendant need only be sufficiently competent to stand trial in order to waive his right to counsel. *See Godinez v. Moran*, 509 U.S. 389, 399, 402 (1993).

Moreover, the government entirely ignores this Court's subsequent decisions characterizing *Faretta* as requiring a detailed inquiry before a defendant can waive his right to counsel. *See, e.g., United States v. Vonn*, 535 U.S. 55, 73 n.10 (2002) (citing *Faretta* for proposition that a defendant can choose self-representation only "after a warning from the court of the perils [it] entails"); *Patterson v. Illinois*, 487 U.S. 285, 298 (1988) (citing *Faretta* for proposition that "we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial").[2] Those decisions, too, suggest that the bare-bones inquiry conducted by the trial court here was insufficient.

2. With considerable understatement, the government acknowledges that "courts of appeals have taken somewhat different approaches in ensuring that a defendant's waiver is knowing and intelligent," with some circuits requiring an inquiry into the defendant's awareness of the risks of self-representation before a defendant can be found to waive the right to counsel, and others not. Opp. 9.[3] We note only that the government ignores the considerable divergence of views among the highest *state* courts on this question, *see* Pet. 14 n.3, 15 n.4, and somewhat imprecisely characterizes the position of one circuit.[4]

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[2] *Cf.* Br. of United States in No. 02-1541, *Iowa v. Tovar*, at 14-15 (Nov. 14, 2003) (quoting this language from *Patterson*, and the "eyes open" language from *Faretta*, but characterizing both as dicta).

[3] Although one circuit has held that a detailed inquiry is required under a "*Miranda*-style prophylactic approach," Pet. 10a (citing *United States v. McDowell*, 814 F.2d 245 (6th Cir. 1987)), another has stated that such an inquiry is constitutionally mandated, *see, e.g., United States v. Peppers*, 302 F.3d 120, 135 (3d Cir.), *cert. denied*, 537 U.S. 1062 (2002).

[4] The Tenth Circuit, like the Third and D.C. Circuits, has held that the absence of an inquiry "mandates" reversal of a finding of waiver, *see United States v. Padilla*, 819 F.2d 952, 959 (10th Cir. 1987), though it has indicated that such an inquiry need not be "thorough and formal," *United States v.*

Faced with this irreconcilable split in the lower courts, the government proffers three reasons that this Court should nevertheless deny certiorari in this case. All three reasons lack merit.

First, the government contends that "the record in this case leaves no reasonable doubt that the command of *Faretta* was fulfilled." Opp. 11-12.[5] But the government concedes, in the same breath, that the brief inquiry conducted by the district court would have been insufficient to support a waiver under the Sixth Circuit's approach — to say nothing of the similar approaches of other circuits. *See id.* at 11. In that inquiry, the district judge did nothing more than warn Mr. Egwaoje, in the most generic terms, about the dangers of proceeding with self-representation. *See* Pet. 3-4. He did not recite the charges against Mr. Egwaoje; did not inform Mr. Egwaoje of the sentence he faced if he was found guilty; and did not advise Mr. Egwaoje about the governing rules at trial. *See id.* Precisely because the inquiry here was so inadequate, this case provides the perfect vehicle for the Court to consider whether a trial court must conduct any inquiry at all — and, if so, how detailed that inquiry should be — before allowing a defendant to waive his right to counsel.

Second, the government suggests that this case is an "unsuitable vehicle" because the lower courts found that "petitioner sought to deliberately manipulate the system by engaging in a pattern of obfuscation and obstructionism." Opp.

Turner, 287 F.3d 980, 983 (10th Cir. 2002).

[5] The government's position in this case is arguably in tension with its position in *Iowa v. Tovar*, in which it stated that "[a] probing colloquy specifically directed at the consequences of self-representation may be necessary to ensure that a defendant who pleads not guilty and proposes to represent himself at trial has a constitutionally sufficient understanding of the potential effects of such a decision." Br. of United States in No. 02-1541, at 16; *but see id.* at 15 n.6 (stating that "[n]o *specific* colloquy should be required in all such cases") (emphasis added).

12-13 (internal quotation omitted). As a preliminary matter, it is unclear *why* the lower courts reached that conclusion: although Mr. Egwaoje had already had three different attorneys, two of those attorneys withdrew of their own accord, *see* Pet. 6a, and Mr. Egwaoje, while repeatedly asserting his right to a speedy trial, does not appear to have sought a continuance until the dispute arose with his third attorney, *see id.* at 6a-7a. Even assuming that Mr. Egwaoje *did* engage in "manipulative conduct," however, the existence of such conduct does not constitute a vehicle problem, but instead merely highlights the very split in the circuits that the government has conceded. Although the government cites various cases for the proposition that "[a] district court may infer that a defendant has knowingly and intelligently waived his right to counsel when the court finds that the defendant seeks to discharge his attorney in order to delay or to sabotage the trial," Opp. 12-13, all of those cases arose in circuits that have held that a district court need not engage in any inquiry before a defendant can be found to waive the right to counsel, and that the validity of a waiver can therefore be inferred from other evidence in the record, *see id.*[6] Conversely, those circuits that have required a district court to engage in an inquiry before finding a waiver have made clear that such an inquiry is required even when the trial judge suspects that the defendant is "attempting to disrupt the administration of justice by manipulative requests for, and dismissals of, counsel." *United States v. Welty*, 674 F.2d 185, 193 (3d Cir. 1982); *see also Buhl v. Cooksey*, 233 F.3d 783, 796 (3d Cir. 2000) (same). As the Third Circuit reasoned, "even well founded suspicions of intentional delay and manipulative

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[6] The government additionally claims that *Faretta* itself stands for the sweeping proposition that "a defendant may not use the Sixth Amendment right of self-representation to manipulate the trial system." Opp. 12 (citing *Faretta*, 422 U.S. at 834-35 & n.46). The cited portion of *Faretta*, however, stands only for the much more modest proposition that courts need not permit defendants who opt for self-representation to "use the courtroom for deliberate *disruption* of their trials." 422 U.S. at 834 n.46 (emphasis added).

tactics can provide no substitute for the inquiries necessary to protect a defendant's constitutional rights." *Welty*, 674 F.2d at 189. To the extent that Mr. Egwaoje engaged in conduct from which the validity of his waiver could be inferred, therefore, this case squarely presents the question whether a trial court must nevertheless engage in a detailed inquiry before such a waiver can be upheld.

Third, the government suggests that this case presents a poor vehicle because there was "overwhelming evidence" of the defendant's guilt. Opp. 15. The government does not contend, however, that any defect in Mr. Egwaoje's waiver of his right to counsel should be subject to harmless-error review. This Court has previously held that the erroneous denial of the correlative right to self-representation cannot be harmless, notwithstanding the fact that the exercise of that right "usually increases the likelihood of a trial outcome unfavorable to the defendant." *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984). *A fortiori*, the improper acceptance of a waiver of the right to counsel has the practical effect of totally depriving a defendant of the assistance of counsel at trial — which this Court has long noted, *see, e.g., Neder v. United States*, 527 U.S. 1, 8 (1999), and the government has long acknowledged, *see, e.g.*, Br. of United States in No. 03-167, *Benitez v. United States*, at 31 (Jan. 29, 2004), constitutes structural error. Accordingly, those circuits that require an inquiry have specifically held that failure to engage in that inquiry rises to the level of structural error. *See United States v. Stubbs*, 281 F.3d 109, 121 (3d Cir.), *cert. denied*, 535 U.S. 1028 (2002); *United States v. Allen*, 895 F.2d 1577, 1580 (10th Cir. 1990). At trial, Mr. Egwaoje presented no affirmative case, *see* Pet. 6; was repeatedly warned for improperly cross-examining witnesses, *see id.*; and received the maximum possible sentence under the Sentencing Guidelines, *see id.* at 9a. If Mr. Egwaoje had been provided counsel, therefore, that counsel could have investigated potential defenses, properly cross-examined the prosecution's witnesses,

and argued for a more lenient sentence. Because the deprivation of this assistance constitutes structural error, the supposed strength of the government's case against Mr. Egwaoje is ultimately irrelevant.

Almost two decades ago, two Justices urged this Court to intervene to resolve the circuit split on whether a detailed inquiry is required before a waiver of the right to counsel can be found. *See McDowell v. United States*, 484 U.S. 980 (1987) (White, J., joined by Brennan, J., dissenting from denial of certiorari). Since then, all of the remaining federal courts of appeals have addressed the issue, eliminating any need for further percolation. At a minimum, this Court should grant certiorari on the first question presented, and hold that the passing warning that Mr. Egwaoje received was inadequate to enable him knowingly and intelligently to waive his right to counsel.

B. THIS COURT SHOULD RECONSIDER ITS DECISION IN *FARETTA v. CALIFORNIA*.

1. The government opens its lukewarm defense of the *Faretta* rule by contending that "[t]his Court has on several occasions reaffirmed its decision in *Faretta*." Opp. 14. To be sure, this Court has in two cases *elaborated* on the *Faretta* rule, by holding that standby counsel may play a limited role when the right to self-representation is exercised, *see McKaskle v. Wiggins*, 465 U.S. 168, 176-88 (1984), and that a defendant may exercise the right to self-representation as long as he is competent to stand trial, *see Godinez v. Moran*, 509 U.S. 389, 396-402 (1993). None of the parties in those cases, however, appears to have suggested that *Faretta* should be overruled. Nothing in this Court's post-*Faretta* jurisprudence, therefore, should deter the Court from revisiting *Faretta* here.

2. The government correctly notes that, in *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000), this Court held that a criminal defendant does not have the right to

represent himself on appeal. *See* Opp. 14. In doing so, however, the Court did not merely conclude that "the justifications for the *Faretta* rule either do not apply at all, or apply with significantly reduced force, to the appellate phase of criminal proceedings." *Id.* Instead, the Court went out of its way to call those justifications into question across the board. Thus, the Court discounted *Faretta*'s historical evidence on the ground that "it pertained to times when lawyers were scarce, often mistrusted, and not readily available to the average person accused of crime," *Martinez*, 528 U.S. at 156; it reasoned that, in light of the Court's decisions in *Gideon v. Wainwright* and related cases, "the original reasons for protecting [a] right [to self-representation] do not have the same force when the availability of competent counsel for every indigent defendant has displaced the need * * * for self-representation," *id.* at 158; it disparaged *Faretta*'s analysis of the Sixth Amendment itself as "nontextual," *id.* at 160; and it concluded that "[n]o one * * * attempts to argue that as a rule *pro se* representation is wise, desirable, or efficient," *id.* at 161. In fact, the Court's opinion in *Martinez* so plainly cast doubt on *Faretta* that three Justices wrote separately to distance themselves from the Court's approach — with Justice Kennedy stating that it was "unnecessary" to call *Faretta* into question in order to decide the case, *see* 528 U.S. at 164 (concurring opinion); Justice Breyer hinting that he would be willing to reconsider *Faretta* in an appropriate case, *see* 528 U.S. at 164-65 (concurring opinion); and Justice Scalia suggesting that the rule of *Faretta* was correct, but perhaps should have been grounded in the Due Process Clause rather than the Sixth Amendment, *see* 528 U.S. at 165 (opinion concurring in the judgment). Notwithstanding the fact that lower courts have faithfully continued to apply *Faretta*, therefore, the government cannot seriously deny that there is lingering uncertainty about the validity of *Faretta* in the wake of *Martinez*. *See* Opp. 14-15.

3. The time is ripe for this Court to revisit *Faretta*. In the

wake of recent high-profile cases involving *pro se* defendants, and even in the months since the petition for certiorari in this case was filed, legal and non-legal commentators alike have renewed their criticisms of the *Faretta* rule. *See, e.g.*, Editorial, *Fool for a Client (Cont'd)*, Wash. Post, Nov. 27, 2003, at A42 (contending that "the proliferation of high-profile self-representation cases should give the Supreme Court cause to rein in the right it declared in *Faretta*, which is long overdue for second thoughts"). Tellingly, the government offers no defense of the merits of the *Faretta* rule in its brief in opposition. *Cf.* Br. of United States in No. 02-1541, *Iowa v. Tovar*, at 16 (Nov. 14, 2003) (conceding that "there exists a strong consensus in the legal community that self-representation at trial is rarely in the defendant's interest"). Society has an undoubted interest in ensuring the fairness of criminal proceedings — an interest that extends well beyond merely ensuring that defendants do not disrupt court proceedings, *see* Opp. 15 n.4, to ensuring that defendants receive a properly contested, and therefore fair, trial.[7]

Finally, this case is a particularly apt vehicle for reconsideration of *Faretta* because Mr. Egwaoje plainly failed to conduct a serious defense. Although the government claims that "petitioner's educational background and experience with the criminal justice system belie the notion that he was incapable of conducting his own defense," Opp. 15 n.5 (citation omitted) — as if a high school education and history of guilty pleas were sufficient to prepare a defendant to conduct a federal criminal trial, *see* Pet. 11a — the government does not deny that Mr. Egwaoje's defense in this case was in fact egregiously deficient. Mr. Egwaoje was warned at least eleven times for asking irrelevant questions and making argumentative

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[7] That concern is particularly acute in capital cases, in which the right of self-representation has not infrequently been invoked. *See* Somini Sengupta, *Amateur Lawyers' Poor Record; History Is Discouraging for Suspect in a Capital Case*, N.Y. Times, Sept. 29, 1998, at B1.

statements during cross-examination; was ordered to "sit down" while he was making his opening statement; and was twice held in contempt for interrupting the trial judge. *See* Pet. 6. This case is the poster child for all that is wrong with the Court's decision in *Faretta*. The Court should grant certiorari on the second question presented as well, and overrule *Faretta*.

C. THE COURT NEED NOT HOLD THIS PETITION FOR *IOWA v. TOVAR*.

In the petition for certiorari, we suggested that the Court may wish to consider holding this petition pending its decision in *Iowa v. Tovar*, No. 02-1541 (cert. granted Sept. 30, 2003). In the three months during which the government was preparing its brief in opposition in this case, *Tovar* has been fully briefed and argued. In light of that briefing and oral argument, we now agree with the government that it is unnecessary to hold this case for *Tovar*. *See, e.g.*, Br. of United States in No. 02-1541, at 15 (noting that "[a] criminal defendant's decision to plead not guilty and to represent himself at trial * * * implicates quite different considerations than does the decision to enter an uncounseled guilty plea"). Because there is no risk that doing so would signal the outcome in *Tovar*, this Court should proceed to consider, and grant, the petition in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

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